DENDRITE INTERNATIONAL, INC., a New Jersey corporation, Plaintiff, v. JOHN DOES Nos. 1 through 4 and DOES 5 through 14, inclusive, Defendants.	SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY CHANCERY DIVISION -- GENERAL EQUITY PART DOCKET NO. MRS-C-129-00 Civil Action

JOHN DOE NO. 3'S BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR LEAVE TO CONDUCT LIMITED EXPEDITED DISCOVERY FOR THE PURPOSE OF OBTAINING INFORMATION TO IDENTIFY JOHN DOE NO. 3

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I. INTRODUCTION

Dendrite International, Inc. ("Dendrite" or "plaintiff") has commenced the present action against fourteen individuals who have been identified as John Does Nos. 1 through 14 in its papers. Dendrite is a publicly traded corporation headquartered in Morris County. Dendrite commenced this action because certain individuals (those identified as John Does Nos. 1 through 4 in its Verified Complaint) had been posting messages on an Internet message board maintained by Yahoo! Inc. This particular message board was dedicated to discussions relating to Dendrite and its publicly traded stock.

Dendrite alleges that it has been unable to ascertain the identity of the individuals it has identified as John Does Nos. 1 through 14. Accordingly, Dendrite has requested that this Court grant it leave to conduct discovery for the purpose of ascertaining the identity of certain of these individuals (i.e., John Does Nos. 1 through 4) from Yahoo!. This request must be denied -- at least as it relates to John Doe No. 3 -- because this action has been commenced by Dendrite against John Doe No. 3 solely for the purpose of harassing him and denying him his constitutional right to exercise his right to free speech in an anonymous manner. (The masculine pronoun is used for convenience, and is not intended to identify the gender of John Doe No. 3.)

John Doe No. 3 posted messages on the Yahoo! message using the screen name "xxplrr". He did so in order to maintain his anonymity, which is what he seeks to protect in this action. John Doe No. 3 is appearing in this action for the limited purpose of opposing plaintiff's request as it relates to him.[1] In doing so, defendant John Doe No. 3 is not agreeing to accept service of

[1] John Doe No. 3 takes no position regarding plaintiff's request as it relates to John Does Nos. 1, 2 and 4.

process in this action nor is he waiving any jurisdictional defenses he may have against plaintiff's action in general, or the service of process in particular. Furthermore, John Doe No. 3 is opposing plaintiff's application anonymously. To do otherwise, would defeat the very purpose of his appearance.

II. BACKGROUND

The present action arises from comments made on an electronic bulletin board, called a message board, maintained by Yahoo! Inc. Yahoo! maintains a message board for every publicly traded company and permits anyone to post messages to it. Nothing prevents the individual from using his real name, but as inspection of these message boards reveals, usually the person chooses an anonymous nickname. These nicknames 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 the responses on the message board at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on the message board is taken with a grain of salt.

John Doe No. 3 participated in this public exchange of ideas and opinions on the Yahoo message board dedicated to Dendrite. In doing so he expressed his opinions and concerns about Dendrite in an articulate and rational manner. Unfortunately for John Doe No. 3, Dendrite wants to limit what its investors/potential investors hear to those opinions which are favorable to Dendrite. Accordingly it has commenced this suit to thwart the free exchange of ideas and opinions facilitated by the Yahoo! message board.

III. JOHN DOE NO. 3 IS ENTITLED TO MAINTAIN HIS ANONYMITY

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amend. I.

The First Amendment ensures all of us of our fundamental right to free speech. It is a right that Dendrite seeks to undermine by filing this action against John Doe No. 3.

It is well-established that the First Amendment protects the right to speak anonymously. The Supreme Court has repeatedly upheld this right. Buckley v. American Constitutional Law Found, 119 S. Ct. 636, 645-645 (1999); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain through the authors of the Federalist Papers.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance, which places in the hands of any individual who wants to express his views the opportunity, at least in theory, to reach other members of the public hundreds or even thousands of miles away, at virtually no cost, and has held that First Amendment rights are fully applicable to communications over the Internet. Reno v. American Civil Liberties Union, 521 U.S. 844.

As did the federal government, the State of New Jersey has embodied our right to free speech in the State Constitution. New Jersey's Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J. Const., Art. 1, ¶ 6.

The New Jersey Supreme Court has observed that our right to free speech interest is "the most substantial in our constitutional scheme." Green Party of N.J. v. Hartz Mountain Indus., Inc., 2000 WL 758410, 752 A.2d 315 (N.J. S. Ct. 2000). Furthermore, New Jersey's Supreme Court has ruled that because the New Jersey's Constitution's free speech provision is an affirmative right, it is broader than practically all others in the nation. Id. In particular, our Supreme Court has stated:

> The reach of our constitutional provision [is] affirmative. Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment.

New Jersey Coalition Against War In The Middle East v. JMB Realty Corp., 138 N.J. 326, 352 (1994).

Furthermore, the New Jersey Supreme Court has determined that our

> State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities.

Id. at 353.

Accordingly, John Doe No. 3's state constitutional right to retain his anonymity is as great, if not greater, than his federal constitutional right.

With the above said, it is important to note that it is not John Doe No. 3's contention that his right to free speech insulates him from liability for any wrongful acts/comments he may have made nor does he contend that this right acts as an absolute bar to the disclosure of his identity. Instead, there must be a careful analysis of plaintiff's claims before John Doe No. 3's constitutional right to anonymity is denied.

This very issue was recently dealt with in the case of Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

> In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with an forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

Id. (Emphasis Added).

The Seescandy Court noted that a plaintiff seeking discovery to identify unknown defendants would need to:

> establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. A conclusory pleading will never be sufficient to satisfy this element. Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant.

Id. (Citations omitted).

As noted by the Seescandy Court, "plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." Id. John Doe No. 3 respectfully submits that this type of analysis should be made in the present action. If it is, Dendrite's request for leave to conduct discovery relating to the identity of John Doe No. 3 must be denied.

IV. PLAINTIFF'S CLAIMS AGAINST JOHN DOE NO. 3 ARE FRIVOLOUS

All of plaintiff's claims against John Doe No. 3 are frivolous. First, as a general principle it should be noted that Dendrite's stock price has increased approximately fifty percent since the time of John Doe No. 3's postings on the Yahoo! message board. Reynolds Cert. Exh. D. Needless to say, this begs the question of how Dendrite can establish the element of damages in its claims against John Doe No. 3. Just as importantly, it demonstrates that Dendrite's real motive in pursuing its claims against John Doe No. 3 is to harass him and to deter his exercise of free speech.

This is illustrated by an analysis of Dendrite's claims against John Doe No. 3. Although plaintiff's complaint includes six distinct claims, only two of these claims are asserted against John Doe No. 3. (The remaining four claims are asserted against those defendants who plaintiff alleges are employees or ex-employees of Dendrite.) These two claims are for libel (Fifth Claim) and misappropriation of trade secrets (Sixth Claim). Both of these claims are frivolous.

A. John Doe No. 3 Has Not Defamed Dendrite

In the Fifth Claim of its Verified Complaint Dendrite alleges that John Doe No. 3 published defamatory statements on the Yahoo! message board. In particular, Dendrite alleges that John Doe No. 3 posted messages:

(i) "That Dendrite's management was secretly and unsuccessfully ‹shopping' the company", and

(ii) "That Dendrite has not been honest in its revenue recognition."

(It should be noted that plaintiff's allegations do not accurately reflect the postings made by John Doe No. 3. For example, John Doe No. 3 did not state that Dendrite acted dishonestly or secretly.)

Plaintiff's defamation claim against John Doe No. 3 is frivolous inasmuch as plaintiff cannot, as a matter of law, establish the fault or damage elements of a *prima facia* case of defamation. Furthermore, an examination of the alleged defamatory statements demonstrates that these statements cannot be considered defamatory in nature.

First, a necessary element of a *prima facia* case of defamation is the requirement that plaintiff prove defendant was at fault in publishing the defamation. There are two fault standards. If the plaintiff is a private person, he or she need show only that the defendant was negligent. If, however, the plaintiff is a public figure, he or she need prove that the defendant was motivated by "actual malice" -- that the defendant either new the statement was false or recklessly disregarded its falsity. See McLaughlin v. Rosanio, Barlets, 331 N.J. Super. 303, 314 (App. Div. 2000).

Dendrite is a publicly traded company with over 1,300 employees in twenty-one countries. In 1999 it had annual sales of $172 million. Reynolds Cert. Exh. B. As demonstrated by the

corporate website it maintains, Dendrite affirmatively places itself in the public arena, it has a ready access to the channels of effective communication, and it has the financial wherewithal to avail itself of this opportunity. Reynolds Cert. Exhs. B & C. In light of this, Dendrite satisfies the criteria to be deemed a public figure. Accordingly, Dendrite needs to establish that John Doe No. 3 acted maliciously in order to prevail on its defamation claim. It cannot do so. As noted in John Doe No. 3's postings, he participated in the give and take of the message board for the very purpose for which this message board was established -- to exchange information relating to Dendrite in connection with possible investments in this company. This, in and of itself, is proper conduct and warrants dismissal of plaintiff's claims.

More importantly, the postings made by John Doe No. 3 relating to the potential sale of the company were precipitated by earlier postings on Yahoo!'s Dendrite message board. Reynolds Cert. Exh. F. John Doe No. 3 did nothing more than participate in a discussion regarding this issue. Similarly, John Doe No. 3's postings relating to Dendrite's change in its revenue recognition policy were also triggered by earlier postings on Yahoo!'s Dendrite message Board. Reynolds Cert. Exhs. G & I. Dendrite's changes in revenue recognition -- and the negative implications of these changes -- were, in fact, referenced in the reports identified in these earlier postings. Reynolds Cert. Exhs. H & J.[2] Again, all John Doe No. 3 did was to participate in an exchange of opinions relating to this issue, relying upon credible information available to the public.

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[2] These reports beg another question -- why isn't Dendrite pursuing claims against the authors of these reports? Apparently Dendrite is reluctant to try to deter the free speech rights of someone who may have the financial ability to prove Dendrite wrong.

In its own website Dendrite references analyst's reports and directs its investors to these analysts. Reynolds Cert. Exh. E. It is difficult to imagine, therefore, what is wrong with a group of Dendrite investors/potential investors doing the same thing. Regardless of what standard of fault might be applicable with respect to plaintiff's claims against John Doe No. 3, it is clear that he was posting messages on Yahoo!'s Dendrite message board in good faith in reliance upon reasonable sources of information. His conduct was not malicious, nor was it even negligent.

Similarly, it is impossible for Dendrite to establish another element of a *prima facia* case of defamation -- namely, its being harmed by the alleged defamation. A plaintiff must incur actual injury to his or her reputation and must produce "concrete proof" that third parties lowered their estimation of the plaintiff or that it suffered pecuniary harm as a result. It is not sufficient that plaintiff suffered embarrassment. Rather, the focus is on the effect of the alleged defamatory statement on third persons, that is, whether they viewed the plaintiff in a lesser light as a result of the offending statement. Simply stated, there can be no defamation if the recipients of the alleged defamatory statements did not believe them. See McLaughlin, supra at 313. Again, as noted previously, Dendrite's stock price has risen fifty percent since the time of John Doe No. 3's postings. Reynolds Cert. Exh. D. It would be impossible, therefore, for Dendrite to establish any damages in its action against John Doe No. 3.

Finally, assuming *arguendo* that plaintiff could establish each of the two elements referenced above, its defamation claim against John Doe No. 3 is frivolous because John Doe No. 3's postings are not defamatory. The initial determination of whether a comment is capable of being construed as defamatory is within the purview of the Court. In deciding whether a statement is defamatory a Court must examine three factors: content, verifiability, and context. See McLaughlin, supra

at 312. An analysis of these factors further demonstrates that Dendrite's claims against John Doe No. 3 are frivolous.

In particular, it is important to consider the context in which John Doe No. 3's postings were made -- i.e., the Yahoo!'s Dendrite message board. This message board includes an express reminder to all of its users that the messages on the message board "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." Reynolds Cert. Exh. A (emphasis added). Obviously, therefore, the meaning of John Doe No. 3's postings are affected by this context and clearly are likely to carry no credibility for the average person than they would in another context. See Lynch v. New Jersey Educ. Ass'n., 161 N.J. 152 (1999) (comments made in context of political campaign carry less credibility). Similarly, Dendrite cannot pursue a defamation claim against John Doe No. 3 based upon an expression of his opinion.

B. John Doe No. 3's Postings Do Not Constitute A Misappropriation Of Dendrite's Trade Secrets.

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating to preserving materials, a pattern for a machine or other device, or a list of customers.

Smith v. BIC Corp., 869 F.2d 194, 199 (3rd Cir. 1989).

Some factors that are considered in determining whether a trade secret actually exists are:

> (1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 200.

With the above in mind, it is first necessary to determine what "trade secrets" Dendrite contends John Doe No. 3 disclosed in his postings[3]. In its Verified Complaint, Dendrite alleges that the trade secret purportedly disclosed by John Doe No. 3 was "details of the workings of Dendrite's confidential contracts with third parties." (Verified Complaint, ¶ 49). A review of John Doe No. 3's postings, however, demonstrates that the only comments that might arguably fall within the scope of this conclusory allegation are certain comments that Dendrite's contracts

[3] Dendrite has refused to expressly identify any such trade secret. Reynolds Cert. ¶ 2.

provide for escalation in revenues -- i.e., the contracts provide for price increases during their term. It is ludicrous for Dendrite to contend this could be a trade secret.

Common sense dictates that this claim by Dendrite against John Doe No. 3 warrants immediate dismissal. Simply stated, the concept of building price increases into a contract is not only known to Dendrite and its competitors, but is a generic contract term that can be utilized in most, if not all, business deals.

Furthermore, Dendrite's claim that it considers the use of a generic price increase provision in its customer contracts to be a "trade secret" makes no sense in light of the public disclosures Dendrite itself makes regarding these contracts. For example, in its annual report Dendrite notes that:

- Service revenues…consist of fees from a wide variety of contracted services, which [Dendrite makes] available to [its] customers, generally under multi-year contracts.
- [Dendrite generates] implementation fees from services provided to configure and implement…software products for…customers, sometimes as part of longer projects….
- [Dendrite receives] technical and hardware support fees….
- [Dendrite charges] for these maintenance services based on a percentage of total license fees plus customization fees, if any.
- [Dendrite receives] sales force support fees….
- Ongoing support fees are generally negotiated at the commencement of a contract. However, it is [Dendrite's] experience that [its] larger customers increase the

amount of services they purchase…over time. Fees for these additional services are typically based on….[4]

- [Dendrite charges its] customers license fees…. Customers generally pay one-time perpetual license fees….
- The Company's software licensing agreements provide for a warranty period….
- The portion of the license fee associated with the warranty period is unbundled from the license fee….

Reynolds Cert. Exh. K. While the above summary does not even include all of the disclosures regarding contract provisions made by Dendrite in its annual statement, this summary clearly demonstrates that Dendrite's misappropriation claim against John Doe No. 3 is merely a pretext being used by Dendrite in its attempt to harass John Doe No. 3 and deter him from exercising his right of free speech.

Finally, assuming *arguendo* that including price increases in its multi-year contracts with its customers could somehow be proven by Dendrite to be a trade secret, its claim against John Doe No. 3 would still be frivolous. First, it should be noted that trade secrets are not given protection against all the world or persons who have not learned the secret by improper means or by virtue of a confidential relation. Boost Co. v. Faunce, 17 N.J. Super. 458, 465 (App. Div. 1952). Furthermore, if no confidential relation exists (as is the case between Dendrite and John Doe No. 3), it would be necessary for plaintiff to prove that John Doe No. 3 should have known that the information he was provided was a trade secret. See Rohm and Haas Co. v. Adco

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[4] This particular disclosure is nearly indistinguishable from what Dendrite apparently contends is the "trade secret" disclosed by John Doe No. 3.

Chemical Co., 689 F.2d 424 (3rd Cir. 1982). Plaintiff merely alleges that John Doe No. 3 learned of Dendrite's "trade secret" from one of its employees.[5] (Verified Complaint, ¶ 51). There is no suggestion, however, that John Doe No. 3 did anything improper. More importantly, it is ludicrous to suggest that John Doe No. 3 would understand that the use of a generic contract provision would be considered a trade secret by Dendrite -- even if he was told about the use of this generic contract provision by one of Dendrite's employees.

In summary, John Doe No. 3 did not misappropriate any of Dendrite's trade secrets because:

- he did not post any trade secret;
- he owed no duty to Dendrite with respect to any such trade secret; and
- there was no reason for him to know that any such trade secret even existed.

[5] This allegation is inconsistent with the tenor of John Doe No. 3's postings regarding his communications with Dendrite's customers.

V. CONCLUSION

For the reasons set forth above, we respectfully request that plaintiff's request for leave to conduct expedited discovery relating to the identity of John Doe No. 3 be denied. Furthermore, we respectfully request that plaintiff's claims against John Doe No. 3 be dismissed in their entirety and that John Doe No. 3 be awarded his costs and expenses, including his reasonable attorneys' fees incurred in connection with this matter.

Respectfully submitted,

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By:_____

EUGENE G. REYNOLDS, ESQ.

Dated: July 11, 2000