UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00941-CMA-BNB

FACONNABLE USA CORPORATION,)
A Delaware Corporation,)
)
Plaintiff,)
)
v.)
)
JOHN DOES 1-10,)
All whose true names are unknown,)
)
Defendants.)

MEMORANDUM SUPPORTING SKYBEAM INC'S EMERGENCY MOTION FOR STAY PENDING DETERMINATION OF SKYBEAM'S OBJECTIONS TO MAGISTRATE JUDGE BOLAND'S ORDER COMPELLING SKYBEAM TO IDENTIFY DEFENDANTS

On May 25, 2011, Magistrate Judge Boyd Boland denied a motion by Skybeam, Inc., a local Internet Service Provider, seeking to modify the Court's order authorizing plaintiff Façonnable USA ("Façonnable") to take early discovery, and seeking a protective order against compliance with a subpoena duces tecum requiring Skybeam to provide information identifying the users of two separate Internet Protocol addresses on several occasions. Despite the fact that Faconnable did not file a cross-motion to compel discovery, or otherwise enforce the subpoena, Judge Boland ordered Skybeam to provide such identifying information no later than June 3, 2011.

Skybeam, Inc., has filed objections to the Judge Boland's order, arguing that the court lacks subject matter jurisdiction, that Judge Boland wrongly rejected the consensus test approved by almost every other court that has considered such motions over the past ten years, and that compliance with the order pending review would irreparably breach the First Amendment right to speak anonymously. Accordingly, Skybeam has moved for a stay of the order pending determination

of Skybeam's objections to the order. This memorandum explains why that a stay should be granted.

Standard for Stay Pending Review

The Tenth Circuit's decision in *F.T.C. v. Mainstream Marketing Services*, 345 F.3d 850 (10th Cir. 2003), establishes the standard for a motion for a stay pending review of a lower court's decision. The customary four factors are "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir.2001)." 345 F.3d at 852. However, "where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed. *Prairie Band [of Powotamie Indians v. Pierce]*, 253 F.3d [1234,] 1246 [10th Cir. 2001]; *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781-82 (10th Cir.1964). Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.' *Prairie Band*, 253 F.3d at 1246-47 (internal quotations omitted)." *Mainstream Mktg Serv.*, 345 F.3d at 852-853.

The Court Should Grant a Stay Pending Review of Skybeam's Objections

The balance of hardships tips decidedly in Skybeam's favor. If a stay is denied, Skybeam will be required to release Doe's identity, in derogation of Doe's First Amendment right to speak anonymously. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U. S. 374, 373 (1976). The Court may assume petitioners will suffer irreparable injury based on the deprivation of these speech

rights. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001); *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). This alone is sufficient to support to support grant of a stay. *Id.*; *see also ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Community Communications Co. v City of Boulder*, 660 F.2d 1370, 1376, 1380 (10th Cir. 1981) (finding "presumption of irreparable harm" in "case rais[ing] substantial, difficult, and novel First Amendment concerns" and ordering "relief pendente lite relief [to] minimize irreparable harm and … permit[s] a meaningful … permanent relief").

By contrast, there is no risk of irreparable injury if the stay is denied and a court later decides that Skybeam should have to supply identifying information. Skybeam promised to preserve the information, it has kept that commitment, and it will continue to do so. If the order under review is sustained and the stay dissolved, the worst that will have happened is that Façonnable's suit for damages will have been delayed. The complaint seeks injunctive relief as well, but because Wikipedia has removed the two pages on which Doe posted his critical comments, the request for injunctive relief has become moot. Moreover, a preliminary injunction against re-posting of the comments would be an impermissible prior restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.")

Moreover, the public interest is best served by staying an order that infringes constitutional rights or is otherwise not in accordance with law. *See*, *e.g.*, *Homans*, 264 F.3d at 1244-45 (public interest is better served by following Supreme Court law and protecting First Amendment rights).

Finally, as more fully amplified in Skybeam's memorandum in support of its objections

("Objec. Mem."), there are many good reasons to believe that the order under review may be overturned. Among other arguments, Skybeam argues that:

— As Judge Boland acknowledged in this opinion, there is a consistent line of precedent in many different state and federal courts over the past ten years holding that the First Amendment requires actual notice to the anonymous Internet speaker and an evidentiary showing of merit before the right to remain anonymous may be taken away. Objec. Mem. 14-20.[1]

— These cases represent a careful balancing of the rights of both plaintiffs and anonymous defendants, trying to make it neither too easy to compel identification, which could create a chilling effect on protected speech, nor too hard for plaintiffs to pursue meritorious claims. *Id.* 7-10.

— There are several strong arguments rebutting the reasons offered by the Magistrate Judge for rejecting this consistent line of authority. *Id.* 20-23.

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[1] *Koch Industries v. Does*, 2011 WL 1775765 (D.Utah May 9, 2011); *Fodor v. Doe*, 2011 WL 1629572 (D.Nev., April 27, 2011); *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430 (2011); *Salehoo v. Doe*, 722 F.Supp.2d 1210 (W.D. Wash. 2010); *USA Technologies v. Doe*, 2010 WL 1980242 (N.D. Cal. May 17, 2010); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (DC 2009); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128 (D.D.C. 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill,* 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. App. 2001); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com, Inc. Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Melvin v. Doe*, 49 Pa.D&C4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003).

— Façonnable's sole claim to federal jurisdiction, a Lanham Act claim, was not viable, both because the elements of such a claim were not pleaded and because there was no evidence to support it; indeed, when Façonnable finally confronted the test for anonymity, it did not even try to show that it had a basis for its Lanham Act claim. *Id.* 26-30.

— The Magistrate Judge relied on a "verification" that was neither attested nor stated on personal knowledge. *Id.* 30.

— The actual facts about Façonnable and its ultimate owner, a Lebanese businessman and politician, and about his relationship to the Hezbollah terrorist organization, are sufficiently complicated that Doe's anonymity should not be compromised without an affidavit on personal knowledge that does more than say, in highly conclusory terms, that Doe has made "false statements." *Id.* 4-5, 30-31.

Moreover, Judge Boland's adoption of an erroneous legal standard is subject to de novo review, and even his application of the law to the facts of this case is subject to de novo review because the issue is whether the First Amendment permits the discovery. *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984).

CONCLUSION

The emergency motion for a stay pending review of Judge Boland's order should be granted.

Respectfully submitted,

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