U.S. District Court Southern District of Florida
(Miami Division)

CIVIL ACTION, CASE #: 03-CV-22328
Judge Moore

Michael J. Zwebner,

Plaintiff,

v.

JOHN DOES, 1-100,

Defendants.
_____/

MOTION TO QUASH

MOTION TO QUASH

The undersigned, Law Office of L. Van Stillman, P.A., files this Motion to Quash a subpoena issued by this Court in the above-styled litigation, as said subpoena pertains to John Doe #32, a/k/a Me Too Tom, pursuant to Rule 45 of the Federal Rules of Criminal Procedure, and alleges as follows:

1. This is an action to quash the omnibus subpoena issued by this Court, on behalf of the Plaintiff, to Lycos Network for the disclosure of the true names of the pseudonyms used on the Lycos Bulletin Board, and for such other information as specified in the subpoena.

2. John Doe #32, a/k/a Me Too Tom, is objecting to the issuance of the subpoena as it pertains to John Doe #32 and is requesting this Honorable Court to quash said subpoena and/or issue, in the alternative, a protective order in favor of Me Too Tom, prohibiting and preventing the Lycos Network from revealing the true name of the individual and or entity using the pseudonym "Me Too Tom".

3. In support of its motion, John Doe #32 would allege that:

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(a) The Plaintiff, Michael J. Zwebner, has failed to show that its need for the identity information requested outweighs the anonymous speakers First Amendment rights;

(b) The Constitutional protections of freedom of association outweighs the Plaintiff's need to be granted access to the true name of John Doe #32;

(c) The Plaintiff has failed to establish in its pleadings that it has a legitimate good-faith basis to contend that it may be a victim of conduct actionable in this jurisdiction against John Doe #32; and

(d) The Plaintiff has failed to establish that the identity of John Doe #32 is centrally needed to advance his claim.

WHEREFORE, for the reasons set forth above, the Defendant, John Doe #32, a/k/a Me Too Tom, respectfully requests this Honorable Court to quash the subpoena as it pertains to John Doe #32, or, in the alternative, to issue a protective order preventing the Lycos Network from divulging the true identity of John Doe #32, a/k/a Me Too Tom.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished this 14th day of November, 2003, to: Michael J. Zwebner, 407 Lincoln Road, Suite 6-K, Miami Beach, Florida 33139.

LAW OFFICE OF L. VAN STILLMAN, P.A.
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By: _____
L. Van Stillman, Esq.
Florida Bar No.: 165520

U.S. District Court

Southern District of Florida (Miami Division)

CIVIL DOCKET
CASE #: 03-CV-22328
Honorable Judge K. Michael Moore

Michael J. Zwebner,

Plaintiff,

v.

JOHN DOES, 1-100,

Defendants.
_____/

MEMORANDUM OF LAW IN SUPPORT OF JOHN DOE #32'S (A/K/A ME TOO TOM) MOTION TO QUASH

CONTENTS

I. INTRODUCTION

This Motion presents an important question of constitutional law: May the constitutionally protected speech, association, and privacy rights of non-litigant internet users be invaded by litigants without prior judicial review? John Doe #32 (a/k/a Me Too Tom) is a subscriber to the Lycos Network and participates in chats on the Lycos sponsored chat room within its internet network. The Plaintiff, Michael J. Zwebner, has filed suit to seek the true identities of those using pseudonyms, more specifically, John Doe #32, within the Lycos Network. Lycos Network hosts online message boards where third-parties may speak to each other, often anonymously, on a wide range of issues including the financial markets, publicly traded companies, and other financial topics. Lycos receives a significant volume of subpoenas from litigants who seek identity information about the anonymous authors of messages posted to these message boards.

This Motion has been filed to quash the subpoena and/or have this Honorable Court issue a protective order preventing the Lycos Network from divulging the true name of John Doe #32. John Doe #32 believes that a litigant should be required to make a threshold showing to a court of its need for the users identity information prior to seeking that information from the third-party provider, in this instance, Lycos Network. Given the important constitutional freedoms of speech and association, as well as user privacy interests that are implicated by attempts to seek those users identities, John Doe #32 urges this Court to grant its Motion based upon the pleadings as hereto filed by the parties.

II. STATEMENT OF FACTS

The Lycos Network is an internet site provider which hosts message boards where third-parties may post messages on a wide variety of topics. The message boards are the online equivalent of a bulletin board where persons may post comments for public viewing. Message board participants discuss financial information, publicly traded companies and other topics.

The exchanges on these boards are often opinionated, and the debate is robust. Although some participants identify themselves in their posts, many choose to post messages under a pseudonym "username."

The Plaintiff in this action, Michael J. Zwebner, has served a subpoena directly to Lycos Network requesting all identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic email and postings on online message boards concerning up to 100 usernames, including the request that the pseudonym be pierced and the actual user's names be identified.

III. ARGUMENT

A. JOHN DOE #32 URGES THE COURT TO ADOPT A BALANCING TEST, REQUIRING MICHAEL J. ZWEBNER TO SHOW THAT ITS NEED FOR IDENTITY INFORMATION OUTWEIGHS THE ANONYMOUS SPEAKERS' FIRST AMENDMENT RIGHTS

1. The First Amendment Protects the Right to Speak Anonymously on the Internet.

The U.S. Supreme Court has held that the right to freedom of speech under the First Amendment encompasses the right to speak anonymously. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment"); and Talley v. State of California, 362 U.S. 60, 65-66 (1960) (holding unconstitutional a state law prohibiting distribution of anonymous handbills).

A speaker on an internet site is the modern day equivalent of a pamphleteer, as the U.S. Supreme Court has recognized:

> Through the use of [online] 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, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, 521 U.S. 844, 870 (1997). Thus, speech on the Internet is entitled to the highest degree of First Amendment protection. Id. See ACLU v. Johnson, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), aff'd, 194 F.3d 1149 (10th Cir. 1999) (recognizing a First Amendment right to communicate and access information anonymously through the Internet); In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 34 (Va. Cir. 2000) ("To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century"); Dendrite Int'l v. Does, No. MRS C-129-00, slip op. at 18-19 (N.J. Sup. Ct., Morris Cty., Nov. 23, 2000) ("Inherent in First Amendment protections is the right to speak anonymously in diverse contests," including on the Internet)

2. The Constitution Protects Freedom of Association on the Internet.

The Constitution protects not only freedom of speech but also freedom of association. See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 558 (1963) (holding unconstitutional a subpoena to intended to discover alleged co-conspirators by compelling release of member identities of NAACP); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (recognizing that a constitutional right to freedom of association protected privacy of NAACP's membership list).

Protection from compelled disclosure of one's private associations is a central tenet of the Constitution. As explained by the U.S. Supreme Court in Gibson.

> It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when [it] tends to impinge upon such highly sensitive areas of freedom of speech . . . freedom of . . . association, and freedom of communication of ideas.

Gibson, 372 U.S. at 558 (citation omitted).

3. The Court Should Require the Plaintiff, Michael J. Zwebner, to Show That Its Need for Identity Information Outweighs These Constitutional Rights, Prior to Issuance of a Subpoena Seeking Such Information.

As described above, speakers on the Internet have the First Amendment right to speak anonymously, and a constitutional right of freedom of association. This Court should require Michael J. Zwebner to show that its need for identifying information about such speakers outweighs those constitutional rights, before a subpoena is issued to the Lycos Network seeking that information. Several courts have recently applied such a test (with slightly different variations) in deciding whether the identity information of an anonymous online speaker should be revealed. John Doe #32 would urge this Court to adopt the opinion filed in the case of John Doe vs. 2 TheMart.com, Inc. by the United States District for the Western District of Washington at Seattle on April 26, 2001. A copy of Judge Thomas S. Zilly's opinion is attached hereto and marked Exhibit "A" for consideration by this Court.

B. MICHAEL J. ZWEBNER'S DOCUMENT REQUEST IS OVERLY BROAD AND IMPINGES ON THE PRIVACY RIGHTS OF THE LYCOS NETWORK USERS.

John Doe #32 believes that the scope of the subpoena is overly broad, and that it seeks "all identifying documents and information" with regard to 100 user names, including, but not limited to, all computer logs, records, email, and postings. Rather than just seeking basic identity information provided by Lycos' users upon registration, the Plaintiff seeks numerous other unrelated information without setting forth a reasonable basis for requesting this information. The request of the subpoena is, therefore, overly broad. The Electronic Communications Privacy Act (ECPA) prohibits disclosure of the contents of private email communications except under very limited circumstances, none of which apply here. See 18 U.S.C. § 2702. Therefore, by seeking any email communications, public or private, of the 100 usernames in the subpoena, the Plaintiff's document request is overly broad and contrary to ECPA.

IV. CONCLUSION

For the reasons set forth above, John Doe #32 (a/k/a Me Too Tom) respectfully requests that this Court issue an order quashing the subpoena as it pertains to John Doe #32, or, in the alternative, issuing a protective order prohibiting Lycos Network from divulging any information, including, but not limited to, the true username of John Doe #32. As additional support for its position, the movant would rely on the case of Global Telemedia International, Inc. et. al. v. Doe 1, et al., decided by Judge David Carter of the United States District Court for the Central District of California, a copy of his order is attached and marked Exhibit "B".

DATED: November 14, 2003

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished this 17 day of November, 2003, to: Michael J. Zwebner, 407 Lincoln Road, Suite 6-K, Miami Beach, Florida 33139.

By: _____
L. Van Stillman, Esq.

"A"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE,

Plaintiff,

v.

2THEMART.COM INC.,

Defendant.

No. C01-453Z

ORDER

This matter comes before the Court on the motion of J. Doe (Doe) to proceed under a pseudonym and to quash a subpoena issued by 2TheMart.com (TMRT) to a local internet service provider, Silicon Investor/InfoSpace, Inc. (InfoSpace). The motion raises important First Amendment issues regarding Doe's right to speak anonymously on the Internet and to proceed in this Court using a pseudonym in order to protect that right. The Court heard oral argument on the motion and issued an oral ruling on April 19, 2001. Due to the importance of the constitutional issues raised by this motion, the Court now issues this written order.

FACTUAL BACKGROUND

There is a federal court lawsuit pending in the Central District of California in which the shareholders of TMRT have brought a shareholder derivative class action against the company and its officers and directors alleging fraud on the market. In that litigation, the defendants have asserted as an affirmative defense that no act or omission by the defendants

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caused the plaintiffs' injury. By subpoena, TMRT seeks to obtain the identity of twenty-three speakers who have participated anonymously on Internet message boards operated by InfoSpace. That subpoena is the subject of the present motion to quash.

InfoSpace is a Seattle based Internet company that operates a website called "Silicon Investor." The Silicon Investor site contains a series of electronic bulletin boards, and some of these bulletin boards are devoted to specific publically traded companies. InfoSpace users can freely post and exchange messages on these boards. Many do so using Internet pseudonyms, the often fanciful names that people choose for themselves when interacting on the Internet. By using a pseudonym, a person who posts or responds to a message on an Internet bulletin board maintains anonymity.

One of the Internet bulletin boards on the Silicon Investor website is specifically devoted to TMRT. According to the brief filed on behalf of J. Doe, "[t]o date, almost 1500 messages have been posted on the TMRT 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 its employees might do better." See Doe's memorandum, docket no. 2 at 4. Past messages posted on the site are archived, so any new user can read and print copies of prior postings.

Some of the messages posted on the TMRT site have been less than flattering to the company. In fact, some have been downright nasty. For example, a user calling himself "Truthseeker" posted a message stating "TMRT is a Ponzi scam that Charles Ponzi would be proud of. . . . The company's CEO, Magliarditi, has defrauded employees in the past. The company's other large shareholder, Rebeil, defrauded customers in the past." Another poster named "Cuemaster" indicated that "they were dumped by their accountants ... these guys are friggin liars ... why haven't they told the public this yet??? Liars and criminals!!!!!" Another user, not identified in the exhibits, wrote "Lying, cheating, thieving, stealing, lowlife

criminals!!!!" Other postings advised TMRT investors to sell their stock. "Look out below!!!! This stock has had it ... get short or sell your position now while you still can." "They [TMRT] are not building anything, except extensions on their homes...bail out now."

TMRT, the defendant in the California lawsuit, issued the present subpoena to InfoSpace pursuant to Fed.R.Civ.P. 45(a)(2). The subpoena seeks, among other things, "[a]ll identifying information and documents, including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online message boards," concerning a list of twenty-three InfoSpace users, including Truthseeker, Cuemaster, and the current J. Doe, who used the pseudonym NoGuano. These users have posted messages on the TMRT bulletin board or have communicated via the Internet with users who have posted such messages. The subpoena would require InfoSpace to disclose the subscriber information for these twenty-three users, thereby stripping them of their Internet anonymity.[1]

InfoSpace notified these users by e-mail that it had received the subpoena, and gave them time to file a motion to quash. One such user who used the Internet pseudonym NoGuano now seeks to quash the subpoena.[2]

NoGuano alleges that enforcement of the subpoena would violate his or her First Amendment right to speak anonymously. In response to the motion this Court issued a Minute Order directing the interested parties TMRT, InfoSpace, and NoGuano to file

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[1] At oral argument, this Court expressed its concern that this subpoena was overly broad. Counsel for TMRT clarified that the only information the defendant was seeking was the identity of the twenty-three listed Internet users. Accordingly, the Court treats this subpoena as if it had only requested the identity of the listed individuals.

[2] NoGuano has moved anonymously to quash the subpoena. At oral argument, counsel for all parties agreed that NoGuano was entitled to appear before this Court anonymously on the motion to quash. When an individual wishes to protect their First Amendment right to speak anonymously, he or she must be entitled to vindicate that right without disclosing their identity. Accordingly, this Court grants NoGuano's request to proceed under a pseudonym for the purposes of this motion. However, this Court does not hold that a person would be allowed to proceed anonymously in all cases or under any circumstances. The Court need not reach this issue in light of the parties' agreement to allow Doe to proceed anonymously before this Court.

additional briefing. All interested parties filed briefing as directed and participated in oral argument.[3]

DISCUSSION

The Internet represents a revolutionary advance in communication technology. It has been suggested that the Internet may be the "greatest innovation in speech since the invention of the printing press[.]" See Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch-22, 75 Tul. L. Rev. 87, 88 (2000). It allows people from all over the world to exchange ideas and information freely and in "real-time." Through the use of the Internet, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." Reno v. ACLU, 521 U.S. 844, 870 (1997).

The rapid growth of Internet communication and Internet commerce has raised novel and complex legal issues and has challenged existing legal doctrine in many areas. This motion raises important and challenging questions of: (1) what is the scope of an individual's First Amendment right to speak anonymously on the Internet, and (2) what showing must be made by a private party seeking to discover the identity of anonymous Internet users through the enforcement of a civil subpoena?[4]

A. The anonymity of Internet speech is protected by the First Amendment.

The right to the freedom of speech is enshrined in the First Amendment to the United States Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. This limitation on governmental interference with free speech applies directly to the federal government, and has been

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[3] Counsel for plaintiffs in the underlying securities litigation appeared at oral argument but did not wish to be heard on the motion.

[4] Neither the parties nor this Court has found any federal court authority evaluating the First Amendment rights of anonymous Internet users in the context of a third-party civil subpoena seeking the identity of those users. The parties have directed the Court to the few state court decisions on this issue.

imposed on the states via the Fourteenth Amendment. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 779-80 (1978).

A court order, even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948). For this reason, numerous cases have discussed the limitations on the subpoena power when that power is invoked in such a manner that it impacts First Amendment rights. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958)(discussing the First Amendment implications of a civil subpoena to disclose the membership list for the NAACP); Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 89 F.R.D. 489 (C.D. Cal. 1981)(discussing the First Amendment implications of a civil subpoena to disclose the names of confidential journalistic sources); Snedigar v. Hoddersen, 114 Wn.2d 153 (1990)(discussing the First Amendment implications of a civil subpoena to disclose the meeting minutes of a political association).

First Amendment protections extend to speech via the Internet. "Through the use of web pages, mail exploders and newsgroups, [any person] can become a pamphleteer." Reno, 521 U.S. at 870. A component of the First Amendment is the right to speak with anonymity. This component of free speech is well established. See, e.g., Buckley v. American Constitutional Law Found., 525 U.S. 182, 200 (1999)(invalidating, on First Amendment grounds, a Colorado statute that required initiative petition circulators to wear identification badges); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995)(overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature, holding that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority."); Talley v. California, 362 U.S. 60, 65 (1960)(invalidating a California statute prohibiting the

distribution of "any handbill in any place under any circumstances" that did not contain the name and address of the person who prepared it, holding that identification and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance.")

The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. See generally McIntyre, 514 U.S. at 341-42. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.

The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999). People who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court. Id.

When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the "core" or "essence" of the First Amendment. See McIntyre, 514 U.S. at 346-47. Governmental restrictions on such speech are entitled to "exacting scrutiny," and are upheld only where they are "narrowly tailored to serve an overriding state interest." Id. at 347. However, even non-core speech is entitled to First Amendment protection. "First Amendment protections are not confined to 'the exposition of ideas[.]'" Id. at 346, citing

Winters v. New York, 333 U.S. 507, 510 (1948). Unlike the speech at issue in Buckley, McIntyre and Talley, the speech here is not entitled to "exacting scrutiny," but to normal strict scrutiny analysis.

In support of its subpoena request, TMRT argues that the right to speak anonymously does not create any corresponding right to remain anonymous after speech. In support of this contention, TMRT cites only to Buckley. TMRT argues that in Buckley, while the Court struck down a requirement that petition circulators wear identification badges when soliciting signatures, the Court upheld a provision of the same statute that required circulators to execute an identifying affidavit when they submitted the collected signatures to the state for counting. However, the Court's reasoning in Buckley does not support the contention that there is no First Amendment right to remain anonymous. It merely establishes that in the context of the submission of initiative petitions to the State, the State's enforcement interest outweighs the circulator's First Amendment protections. Buckley, 525 U.S. at 200, quoting McIntyre, 514 U.S. at 523 (Ginsberg, J., concurring)("We recognize that a State's enforcement interest might justify a more limited identification requirement.") The right to speak anonymously is therefore not absolute. However, this right would be of little practical value if, as TMRT urges, there was no concomitant right to remain anonymous after the speech is concluded.

B. Applicable legal standard.

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. 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. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

As InfoSpace has urged, "[u]nmeritorious attempts to unmask the identities of online speakers . . . have a chilling effect on" Internet speech. The "potential chilling effect imposed by the unmasking of anonymous speakers would diminish if litigants first were required to make a showing in court of their need for the identifying information." "[R]equiring litigants to make such a showing would allow [the Internet] to thrive as a forum for speakers to express their views on topics of public concern." See InfoSpace's memorandum, docket no. 14 at 2. InfoSpace and NoGuano have accordingly urged this Court to "adopt a balancing test requiring litigants to demonstrate . . . that their need for identity information outweighs anonymous online speakers' First Amendment rights[.]" Id.

In the context of a civil subpoena issued pursuant to Fed.R.Civ.P. 45, this Court must determine when and under what circumstances a civil litigant will be permitted to obtain the identity of persons who have exercised their First Amendment right to speak anonymously. There is little in the way of persuasive authority to assist this Court. However, courts that have addressed related issues have used balancing tests to decide when to protect an individual's First Amendment rights.

In Columbia Ins. Co. v. Seescandy.com, the plaintiff was unable to identify the defendants when filing the complaint. That complaint named J. Doe defendants, and alleged, *inter alia,* the infringement of a registered trademark when those defendants registered the "Seescandy.com" domain name. See Seescandy.com, 185 F.R.D. at 576. The J. Doe defendants had engaged in the allegedly tortious conduct entirely online, and anonymously. Id. at 578. The court considered whether to allow discovery to uncover the identity of the defendants so that they might be properly served and subject to the jurisdiction of the court. The court recognized the defendant's "legitimate and valuable right to participate in online forums anonymously or pseudonymously." Id.

Accordingly, the court ruled that four limiting principals would apply to such discovery. The court required that the plaintiff identify the individual with some specificity

so the court could determine if they were truly an entity amenable to suit, and that the plaintiff identify all previous steps taken to locate the defendant, justifying the failure to properly serve. Id. at 578-579. The Seescandy.com court imposed two other requirements that have direct relevance here. First, the plaintiff was required to show that the case would withstand a motion to dismiss, "to prevent abuse of this extraordinary application of the discovery process and to insure that plaintiff has standing[.]" Id. at 579-80. Second, the plaintiff was required to file a discovery request justifying the need for the information requested. Id. at 580. Therefore, the court required the plaintiff to demonstrate that the suit, and the resulting discovery sought, was not frivolous, and to demonstrate the need for the identifying information.

Similarly, in In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372, (Va.Cir.Ct. 2000), the court reviewed a subpoena seeking the identity of certain J. Doe defendants who had allegedly made defamatory statements and disclosed confidential information online. See America Online, Inc., 2000 WL 1210372, *1. The Virginia court recognized the First Amendment right to Internet anonymity, and held that an Internet service provider could assert that right on behalf of its users. See id., *5-6. The court applied a two part test determining whether the subpoena would be enforced. First, the court must be convinced by the pleadings and evidence submitted that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed[.]" Id., *8. Second,"the subpoenaed identity information [must be] *centrally needed to advance that claim*." Id. (emphasis added). In that particular case, because the court concluded that the plaintiff had met these requirements, the discovery was allowed. The Virginia court concluded that the compelling state interest in protecting companies outweighed the limited intrusion on the First Amendment rights of any innocent Internet users. Id.

The courts in Seescandy.com and America Online, Inc. applied similar factors. Both required a showing of, at least, a good faith basis for bringing the lawsuit, and both required some showing of the compelling need for the discovery sought. In both cases, the need for the information was especially great because the information sought concerned J. Doe *defendants*. Without the identifying information, the litigation against those defendants could not have continued.

The standard for disclosing the identity of a non-party *witness* must be higher than that articulated in Seescandy.com and America Online, Inc. When the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity. Therefore, non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.

Accordingly, this Court adopts the following standard for evaluating a civil subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation. The Court will consider four factors in determining whether the subpoena should issue. These are whether: (1) the subpoena seeking the information 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) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.[5]

This test provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of civil litigants to protect their interests through the

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[5] This Court is aware that many civil subpoenas seeking the identifying information of Internet users may be complied with, and the identifying information disclosed, without notice to the Internet users themselves. This is because some Internet service providers do not notify their users when such a civil subpoena is received. The standard set forth in this Order may guide Internet service providers in determining whether to challenge a specific subpoena on behalf of their users. However, this will provide little solace to Internet users whose Internet service company does not provide them notice when a subpoena is received.

litigation discovery process. The Court shall give weight to each of these factors as the court determines is appropriate under the circumstances of each case. This Court is mindful that it is imposing a high burden. "But the First Amendment requires us to be vigilant in making [these] judgments, to guard against undue hindrances to political conversations and the exchange of ideas." Buckley, 525 U.S. at 192.

C. Analysis of the present motion.

In the present case, TMRT seeks information it says will validate its defense that "changes in [TMRT] stock prices were *not* caused by the Defendants but by the illegal actions of individuals who manipulated the [TMRT] stock price using the Silicon Investor message boards." This Court must evaluate TMRT's stated need for the information in light of the four factors outlined above.

1. Was the subpoena brought in good faith?

This Court does not conclude that this subpoena was brought in bad faith or for an improper purpose. TMRT and its officers and directors are defending against a shareholder derivative class action lawsuit. They have asserted numerous affirmative defenses, one of which alleges that the defendants did not cause the drop in TMRT's stock value. TMRT could reasonably believe that the posted messages are relevant to this defense.

However, as originally issued the subpoena seeking the identity information was extremely broad. The subpoena would have required the disclosure of personal e-mails and other personal information that has no relevance to the issues raised in the lawsuit. This apparent disregard for the privacy and the First Amendment rights of the online users, while not demonstrating bad faith *per se*, weighs against TMRT in balancing the interests here.

2. Does the information sought relate to a core claim or defense?

Only when the identifying information is needed to advance core claims or defenses can it be sufficiently material to compromise First Amendment rights. See Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)(in order to overcome the journalistic

privilege of maintaining confidential sources, a party seeking to identify those sources must demonstrate, *inter alia*, that the "information goes to the heart of the matter[.]") If the information relates only to a secondary claim or to one of numerous affirmative defenses, then the primary substance of the case can go forward without disturbing the First Amendment rights of the anonymous Internet users.

The information sought by TMRT does not relate to a core defense. Here, the information relates to only one of twenty-seven affirmative defenses raised by the defendant, the defense that "no act or omission of any of the Defendants was the cause in fact or the proximate cause of any injury or damage to the plaintiffs." This is a generalized assertion of the lack of causation. Defendants have asserted numerous other affirmative defenses that go more "to the heart of the matter," such as the lack of material misstatements by the defendants, actual disclosure of material facts by the defendants, and the business judgment defense.[6] Therefore, this factor also weighs in favor of quashing the subpoena.

3. Is the identifying information directly and materially relevant to a core claim or defense?

Even when the claim or defense for which the information is sought is deemed core to the case, the identity of the Internet users must also be materially relevant to that claim or defense. Under the Federal Rules of Civil Procedure discovery is normally very broad, requiring disclosure of any relevant information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). But when First Amendment rights are at stake, a higher threshold of relevancy must be imposed. Only when the information sought is directly and materially relevant to a core claim or defense can the need for the information outweigh the First Amendment right to speak anonymously. See Los Angeles Memorial Coliseum Comm'n, 89 F.R.D. at 494 (holding that a party seeking to

[6] Many of TMRT's affirmative defenses might be viewed by this Court as "non-core," including comparative fault, estoppel, laches, and unclean hands.

enforce a subpoena to disclose non-party journalistic sources must demonstrate that the information is of "certain relevance.")

TMRT has failed to demonstrate that the identity of the Internet users is directly and materially relevant to a core defense. These Internet users are not parties to the case and have not been named as defendants as to any claim, cross-claim or third-party claim. Therefore, unlike in Seescandy.com and America Online, Inc., their identity is not needed to allow the litigation to proceed.

According to the pleadings, the Internet user known as NoGuano has never posted messages on Silicon Investor's TMRT message board. At oral argument, TMRT's counsel conceded this point but stated that NoGuano's information was sought because he had "communicated" via the Internet with Silicon Investor posters such as Truthseeker. Given that NoGuano admittedly posted no public statements on the TMRT site, there is no basis to conclude that the identity of NoGuano and others similarly situated is directly and materially relevant to TMRT's defense.

As to the Internet users such as Truthseeker and Cuemaster who posted messages on the TMRT bulletin board, TMRT has failed to demonstrate that their identities are directly and materially relevant to a core defense. TMRT argues that the Internet postings caused a drop in TMRT's stock price. However, what was said in these postings is a matter of public record, and the identity of the anonymous posters had no effect on investors. If these messages did influence the stock price, they did so without *anyone* knowing the identity of the speakers.

TMRT speculates that the users of the InfoSpace website may have been engaged in stock manipulation in violation of federal securities law. TMRT indicates that it intends to compare the names of the InfoSpace users with the names of individuals who traded TMRT stock during the same period to determine whether any illegal stock manipulation occurred. However, TMRT's innuendos of stock manipulation do not suffice to overcome the First

Amendment rights of the Internet users. Those rights cannot be nullified by an unsupported allegation of wrongdoing raised by the party seeking the information.

4. Is information sufficient to establish TMRT's defense available from any other source?

TMRT has failed to demonstrate that the information it needs to establish its defense is unavailable from any other source. The chat room messages are archived and are available to anyone to read and print. TMRT obtained copies of some of these messages and submitted them to this Court. TMRT can therefore demonstrate what was said, when it was said, and can compare the timing of those statements with information on fluctuations in the TMRT stock price. The messages are available for use at trial, and TMRT can factually support its defense without encroaching on the First Amendment rights of the Internet users.

CONCLUSION

The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale. For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.

Courts should impose a high threshold on subpoena requests that encroach on this right. In order to enforce a civil subpoena seeking the identifying information of a non-party individual who has communicated anonymously over the Internet, the party seeking the information must demonstrate, by a clear showing on the record, that four requirements are met: (1) the subpoena seeking the information 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) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

The Court has weighed these factors in light of the present facts. TMRT has failed to demonstrate that the identify of these Internet users is directly and materially relevant to a core defense in the underlying securities litigation. Accordingly, Doe's motion to quash the subpoena is GRANTED.

IT IS SO ORDERED.

DATED this 26th day of April, 2001.

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

Central District of California U.S.D.C.

Recently Issued Opinions and Orders

Subject:	Case Number:	Title:	Date Posted:
Opinions and Orders of Previous Years	SA CV 00-1155 DOC (EEx)	Global Telemedia International, Inc.; Jonathon Bentley-Stevens; Regina S. Peralta v. Doe 1 aka BUSTEDAGAIN40; Doe 2 aka ELECTRICK_MAN; Doe 3 aka BDAMAN609; and Does 4 through 35, inclusive - Order Granting Defendants' Special Motion to Strike	03/12/2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Global Telemedia International, Inc.; Jonathon Bentley-Stevens; Regina S. Peralta, Plaintiffs, v. Doe 1 aka BUSTEDAGAIN40; Doe 2 aka ELECTRICK_MAN; Doe 3 aka BDAMAN609; and Does 4 through 35, inclusive, Defendants.	Case No. SA CV 00-1155 DOC (EEx) **ORDER GRANTING DEFENDANTS' SPECIAL MOTION TO STRIKE**

Before the Court are Special Motions to Strike brought by Defendant Barry King aka BDAMAN609 ("King") and Defendant Reader aka ELECTRICK_MAN's ("Reader"). King and Reader filed two separate motions; because they raise the identical legal arguments based on similar facts, the motions will be considered together. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7.11. Accordingly, the hearing scheduled for February 26, 2001 at 8:30 a.m. is removed from the Court's calendar. After consideration of all papers submitted by both Defendants and Plaintiffs, the Court GRANTS Defendant Reader's Motion and GRANTS Defendant King's Motion.

I. Background

Plaintiff Global Telemedia International, Inc. ("GTMI") is a publicly traded telecommunications company trading on the National Association Securities Dealers OTC Bulletin Board ("OTCBB") or the Electronic Bulletin Board. The OTCBB is a regulated quotation service that displays real-time quotes, last-sale prices, and volume information in over-the-counter equity securities. An OTC company typically is not listed or traded on NASDAQ or a national securities exchange.

While GTMI had been incorporated and operated under various management teams, Plaintiff Jonathon Bentley- Stevens ("Stevens") took over the company in June 1999. The company began trading publicly as GTMI in that month.[1] Its press releases describe it as "a leader in Voice over IP, LAN VPN (Virtual Private Network), ISP, Virtual ISP, and PC-PC, PC-Phone, data and voice, Smart e-Card solutions, (www.smart-e-card.net). It also owns manufacturing, telecom, ISP, and software development facilities in Australia, Malaysia and the Philippines." Gray Decl., Ex. T. It has traded from around $0.80 a share in June of 1999 to a high of around $4.70 a share in March of 2000 to a low of $0.25 share in October 2000. Opp'n to King Mot. at 9. It spiked up to the $2.75 range and back down below $1.00 between approximately March and April of 2000. It has closed at below $1.00 a share since April

of 2000. Stevens Decl. in Opp'n to King Mot., Ex. B-1.

Between March 2000 and the filing of the instant complaint, Defendant Reader and Defendant King posted numerous messages on the Raging Bull Message Boards, an Internet bulletin board.[2] Raging Bull is a financial website that organizes individual bulletin boards or "chat-rooms," each one dedicated to a single publicly traded company. The chat-rooms are open and free to anyone who wants to read the messages; membership is also free and entitles the member to post messages. While the majority of posters appear to be investors in the company or prospective investors, stock ownership is not required to post. Posters typically are not identified by their real names, but by names created by each individual. For example, as noted above, Reader posted under the name of "electrick_man" and King posted under the name "BDAMAN609." Other handles include "foolsfool9," raginghuff," "nvshawty," "akitaman," and "joemeat." Gray Decl., Ex. G.

Unlike many traditional media, there are no controls on the postings. Literally anyone who has access to the Internet has access to the chat-rooms. The chat-rooms devoted to a particular company are not sponsored by that company, or by any other company. No special expertise, knowledge or status is required to post a message, or to respond. The postings are not arranged by topic or by poster. The vast majority of the users are, because of the "handles," effectively anonymous. The messages range from relatively straightforward commentary to personal invective directed at other posters and at the subject company to the simply bizarre. For example, one exchange includes "joemeat, you are one of the stupidest suckers that ever posted here" to which "joemeat" responded "akita: that means so much coming from a degenerate who speaks regularly from his lower orifice." Gray Decl., Ex. G.

It is in this milieu that Reader and King posted messages in the GTMI chat-room. Reader began posting in March 2000 and apparently has continued at least through October 2000. King began posting in March 2000 as well. The postings are the subject of the instant complaint. Both Reader and King posted negative and allegedly libelous comments about GTMI and Stevens. Plaintiffs filed a complaint in state court for trade libel, libel per se, interference with contractual relations and prospective economic advantage against several posters, including Reader and King; Defendants removed the matter to this Court on November 22, 2000. Reader and King filed separate motions to strike pursuant to California Civil Procedure § 425.16.

II. Discussion

Reader and King are being sued as a result of less-than-flattering postings about GTMI on the Internet. In bringing their motions to strike under § 425.16, King and Reader argue that this suit is brought against them as a "transparent effort to intimidate and silence individuals who are critical of Plaintiffs' corporate performance." Reader Mot. at 1.

Section 425.16 was passed in 1992. The California State Legislature found that

> [T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares 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.

§ 425.16(a).

These disfavored lawsuits are commonly referred to as Strategic Litigation Against Public Participation, or SLAPP, lawsuits. Section 425.16 permits a defendant to dismiss a lawsuit if the alleged bad acts arose from his or her exercise of free speech "in connection with a public issue" and if the plaintiff cannot show a probability of success on the claims. § 425.16(b)(1). Thus, the questions before the Court are (1) whether the postings were an exercise of Defendants' right to free speech "in connection with a public issue," and (2) whether Plaintiffs have a probability of success on their claims.

A. "In Connection with a Public Issue"

Section 425.16(e) provides that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with public issue includes: . . . (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." Plaintiffs do not argue that Reader and King were not exercising their right to free speech or that their speech did not take place in a public forum. Rather, Plaintiffs argue that King and Reader were engaging in commercial speech, specifically defamatory commercial speech, about a company which is not of public interest but simply has been exposed to media coverage. Plaintiffs argue that to extend the SLAPP provisions to commercial contexts or to commercial speech would eliminate the tort of business defamation. Plaintiffs' arguments are not supported by law or the facts of this case.

GTMI is a publicly traded company with as many as 18,000 investors between March 2000 and October 2000. Stevens Decl. in Opp'n to King Mot. ¶ 12. GTMI itself has inserted itself into the public arena and made itself a matter of public interest by means of numerous press releases issued since 1999. Gray Decl., Ex. P at 97; Ex. Q at 112; Ex. R. at 122; Ex. T at 127-49; Ex. U at 150-53; Stevens Decl. in Opp'n to Reader Mot., Ex. D at 5. Further, a publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole. This is particularly so when the company voluntarily trumpets its good news through the media in order to gain the attention of current and prospective investors. The fact that a chat-room dedicated to GTMI has generated over 30,000 postings further indicates that the company is of public interest.

Its status as a commercial enterprise does not, as GTMI would have it, insulate it from a SLAPP motion. *See Church of Scientology of Cal. v. Wollersheim*, 42 Cal. App. 4th 628, 651, 49 Cal. Rptr. 2d 620, 633 (1996) (holding that matters of public interest "include product liability suits, real estate or investment scams, etc."). While of course the Court is not implying that GTMI is connected to a scam, the point is that GTMI is not a matter of public interest merely because of "media attention or "sensation" but rather because it has had over 18,000 public investors and is the topic of literally tens of thousands of Internet postings.[3]

The cases cited by Plaintiffs do not suggest otherwise. In *Globetrotter Software, Inc. v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999), the court found that the "'issue of public interest' test is not met by 'statements of one company regarding the conduct of a competitor company.'" The court explicitly rejected applying the anti-SLAPP provisions to cases involving business competitors, but equally clearly did not reject the use of the provisions to all commercial cases or to all cases involving trade libel. Adopting the court's reasoning here, Reader and King are small individual investors who are not in the communications business, or in any business that could be said to be competing with Plaintiffs. They were speaking not as competitors, but simply as investors.

Plaintiffs' assertions to the contrary, applying the anti-SLAPP statute here will not have a chilling effect on business defamation cases in general. This holding does not foreclose defamation cases involving two competitors. Nor does it necessarily foreclose defamation cases against individuals, as not all businesses will be found to be a "public issue." Further, even where a business is found to be of public concern, where there is a probability of success, the claim may proceed.

The Court finds that the anti-SLAPP provisions are applicable in this matter and that Reader's and King's postings were an exercise of their free speech in connection with a public issue.

B. Probability of Success

Once a defendant has established a prima facie case that the basis of the claims against him arose out of acts in furtherance of his right to free speech in connection with a public issue, the burden shifts to plaintiff to demonstrate a probability of success. *Globetrotter Software,* 63 F. Supp. 2d 1127 at 1129. Here, GTMI has alleged trade libel, libel per se (defamation) and interference with contractual relations and prospective economic advantage.

1. Trade Libel and Defamation

a. Standards

Trade libel requires that Reader and King published a false statement which induced others not to deal with Plaintiffs, knowing it was false or acting with reckless disregard of its falsity, and caused Plaintiff monetary damages. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 548-9 216 Cal. Rptr. 252, 254-55 (1985). Defamation requires a false statement of fact made with malice that caused damage. *Ringler Assoc. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179, 96 Cal. Rptr. 2d 136, 148 (2000).

Both Reader and King argue that their statements were opinion and that opinions are not actionable under either trade libel or libel per se; GTMI responds that statements in a business context which imply dishonesty or incompetence are actionable, and that the opinion/fact distinction as set forth in the media cases cited by Reader and King is irrelevant because it applies only to the media. As to Plaintiffs' first argument, Defendants and Plaintiffs are not competitors and the chat-rooms do not constitute a business context. *Rosenberg v. J.C. Penney Co.*, 30 Cal. App. 2d 609, 86 P.2d 69 (1939) is inapposite here, as it involved two business competitors, with one using artful advertising to convey libelous sentiments about its rival.

As to Plaintiffs' second argument, as Reader and King correctly argue, the fact/opinion distinction does not apply just to media defendants. *See Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999) (applying fact/opinion distinction in case alleging that defendant's website postings were libelous); *Rudnick v. McMillan*, 22 Cal. App. 4th 1183, 1191, 31 Cal. Rptr. 2d 193, 197 (1994) (applying fact/opinion standard in case where defendant wrote an allegedly defamatory letter to the editor of a local newspaper). If the statements are opinion rather than fact, then they are not actionable.

To determine whether a statement is an opinion or fact, the Court must look at the totality of the circumstances. This entails examining the statement in its "broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work." *Nicosia*, 72 F. Supp.2d at 1101 (citing *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995)). Then, the specific context and content of the statement is examined, "analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." Finally, the Court must determine whether the statement is "sufficiently factual to be susceptible of being proved true or false." *Id.*

b. Application

Here, the general tenor, the setting and the format of both Reader's and King's statements strongly suggest that the postings are opinion. The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about GTMI and its turbulent history. At least several participants in addition to Defendants were repeat posters, indicating that the posters were just random individual investors interested in exchanging their views with other investors.

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. For example, in June, King posted the following:

> get off my back cowboy I am ready to send that message to the powers that be since you just accused me of being a druGgie, libel slanderous cheap attack. This company has put it up your arse again this week no filing no nothin no chance to buy it OFF SHORE ON INTERNATIONAL EXCHANGES, dill weed I bet you get your frustrations worked out at he YMCA stupid flippin puss I got info comin at you that will make you puke about this stock and then you can thank me.

Stevens Decl. in Opp'n to King Mot., Ex. A at 53.

Or,

> nschefet or whatever hey I hold several thousand shares mysefl and I am still in the green but God what a way to make your day go by and watch the soap opera and everyhting is within the electronic world guidelines grow up kids before you fall off your perch Go GTMI ....roflmao again oh too much fun goodbye kids and thanks for the death threat the webmaster will love it :).

Id., Ex. A at 46.

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. It is unlikely, for example, that a corporation would express the view that investors should "up the volume for some of that 2 dollar love" or "gotta

love this companies potential." *Id.*, Ex. A at 57. Nor would the SEC ever state that GTMI is "steering the sinking ship but don't worry they are headed for the calmer waters of the carribean where your money will be safe from federal authorities." *Id.*, Ex. A at 39.

In short, the general tone and context of these messages strongly suggest that they are the opinions of the posters. In addition, the content and style of the individual postings support a finding that they are the opinions of the posters.

i. Reader

Reader posted two messages stating that the company's plans were slow, practically non-existent or just plans on a drawing board. Stevens Decl. in Opp'n to Reader Mot., Ex. 1 at 37, 43. In the first, Reader states, "The thing that concerns me is their PR statements give them the appearance of being so high tech, so cutting edge but their real life product is so slow or non-existant." *Id.* at 37. A day later, on March 26, 2000, he posted a second message in reply to "joemeat$$$" which appears to be a clarification of his first posting: "Restatement[.] The companies statements are so forward looking that: 'Their real life product roll-out is so slow and several of their products are just plans on the drawing board (do not exist).' Thanks for pointing out my error." *Id.* at 43.

In both messages, Reader uses exaggeration, figurative speech and broad generalities. Nothing in these statements suggests that he is speaking knowledgeably about the company. He does not specify the products or the PR statements. Nor does he say that GTMI says anything contrary to his statement about the products. Rather, Reader appears to be making a broad statement that he does not agree with GTMI's PR statements. The reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that Electrik_Man$$$ was airing anything other than his personal views of the company and its prospects. *See Biospherics v. Forbes*, 151 F.3d 180, 184 (4th Cir. 1998) (holding that a column's observation that a company's stock price was based on "hype and hope" was opinion).

In another posting on March 25, Reader posted the following: "SEC link[.] To view Jonathon Bentley Stevens violations: http://www.sec.gov/enforce/litigrel/lr15774.txt[.] He was busted for misrepresentation and overstatement of the facts: Let the truth be told...." Here, his statement about Stevens is clearly based on a public document which he provides for the readers. Thus, any reader may look at the same document and determine what they think of the information. By supplying the underlying document which supports his views, Reader has set forth an opinion, not fact. *Nicosia*, 72 F. Supp. 2d at 1102.

In addition, despite Plaintiffs' argument to the contrary, "busted" in this context does not mean "arrested." While the average investor may interpret "busted" as "caught" or "found out," that reader is highly unlikely to believe that the SEC has arrested anyone for "misrepresentation" or "overstatement." Reader is simply stating his opinion that the SEC is investigating Bentley-Stevens, which in point of fact it is. Gray Decl., Exs. A, B, C.

ii. King

King posted at least 57 messages between March and October 2000. Stevens Decl. in Opp'n to King Mot., Ex. A at 2-58. Plaintiffs place several at issue in their oppositions.

1) "Sinking Ship"

On June 12, 2000, at approximately 4:37 p.m., King posted the following:

> akitaman we did get news today! another board poster says the PR will come out tomorrow....rolfmao that was funnier than some of my jokes today.... another day with GTMI steering the sinking ship, but don't worry they are headed for the calmer waters of the carribean where your money will be safe from federal authorities,,now thats newz, speling was for hyplori :)"

Stevens Decl. in Opp'n to King Mot., Ex. A at 39.

Here, in the context of the full message, King's comments are hyperbolic and figurative. The posting is also in response to another posting, making it less likely to be a statement of fact. Given the tone and context of the message, a reasonable reader would not take this to be anything more than a disappointed investor who is making

sarcastic cracks about the company. At this point, the company was trading as low as $0.43 a share and closed at $0.75, so it would not be unreasonable for an investor to be sarcastic about a company he bought at $2.00. Nor are these statements susceptible to proof, as would be a statement of fact.

2) "Fly the Coop"

Plaintiffs identify another message dated June 12, 2000, at 4:48 p.m. which reads in full:

> uncle ernie trust your stomach, that feeling that says we are beeing manipulated by the company so that they can fly the coop again, who oh why must we keep saying I hear they are, they said they were, WERE IS THE PR TO THE LONGS SAYING SORRY FOOLS WE WENT BELLY UP SORRY FOR SPOING YOUR WEEKEND, SORRY FOR NOT MEETING OUR TARGET DATES AND OH YEA SORRY WE MISSED THE BOAT IN GETTING OUR PRODUCT OUT. And as for MYIQ, get real that is a shell company and the history is sour, no one is ready for Internet education well maybe hyplori since he/she is the spelling critic."

Stevens Decl. in Opp'n to King Mot., Ex. A at 37.

Plaintiffs argue that "fly the coop again" is stating a fact that "GTMI not only intends to steal investor money, but that such theft is or will be merely a repeat of a previous GTMI theft. This is not opinion, but an outright accusation of criminal intention coupled with proof based on alleged albeit unstated prior criminality." Opp'n to King Mot. at 8. First, the Court notes that "fly the coop" is a colloquial expression meaning "to depart suddenly or surreptitiously, escape, flee." Webster's Third New Int'l Dictionary 879 (1986). There is no implication of theft or criminality. Second, "fly the coop" is part of a rambling sentence full of figurative and expressive language ("trust your stomach," "why oh why") and sarcasm. Given the context and the content, no reasonable reader would believe that King was stating a fact that the company was going to flee or escape. Again, the statement is simply part of a negative rant against a company that on that date closed at $0.75 a share. The posting is written with a great deal of linguistic informality, thus alerting a reasonable reader to the fact that these observations are probably not written by someone with authority or firm factual foundations for his beliefs.

3) "Screwed out of your money"

On October 2, King posted: "Dick T is a done deal you and I don't count, sell tomorrow take your dollars, write off the loss, buy some Krispy Kreme they will do well in the 4th Q as the holidays are a comin.....and by the way if you go to the SHM make sure you take a piece of the furniture its the only gift you will receive from these jokers.....you have been screwed out of your hard earned money here its time to talk about a lawsuit." Stevens Decl in Opp'n to King Mot., Ex. A at 12.

Plaintiffs argue that "Mr. King appears to be soliciting a shareholder lawsuit against GTMI." Opp'n to King Mot. at 8. While the Court disagrees with this interpretation, even if that is the import of the message, then it is simply the opinion of a shareholder who believes a lawsuit may be his only recourse against a company whose stock was then trading at around $0.45 a share. Even if it were a fact that King were actually soliciting a lawsuit, stating that intent is not actionable libel.

4) "Lie"

On October 7, 2000, King posted, "I have never witnessed such blatant mis-management, these people hold our money and they dictate after they lie how it will be used.....greatest joke on the boards." Stevens Decl. in Opp'n to King Mot., Ex. A at 4. This Plaintiffs interpret as King saying, "in essence, that GTMI misrepresents its business intentions, apparently as part of its standard practice to say anything to raise investor funds." Opp'n to King Mot. at 8. Again, while King's sentiments are not positive, the statement contains exaggerated speech and broad generalities, all indicia of opinion. Given the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company is run. This is especially the case given that the closing price per share in early October was about $0.45.

In sum, neither Reader's nor King's postings are statements of fact. Given the general context of the postings, the colorful and figurative language of the individual postings, the inability to prove the statements true or false, and in one case, the posting of documents to support the poster's statements, the postings are opinions.

iii. Damages

Even if the statements were actionable statements of fact, and not opinion, Plaintiffs must show damages as a result of the postings. Plaintiffs contend that they were damaged by both Defendants' postings because the postings caused the stock to lose value, and Plaintiffs further contend that Defendants posted their messages with that intent. Opp'n to King Mot. at 1, 9 and 17; Opp'n to Reader Mot. at 13-14. The facts do not support Plaintiffs' contention.

With respect to King, there is no correlation between his postings and the drop in stock prices. King's first posting on March 17, 2000 was a glowing recommendation: "wayitgoes, I am loading up, Schwab won't take my nibbling had to up the volume for some of that 2 dollar love. This and my EDIG will take me to the next level. Gotta love this companies potential. Bdaman with GTMI in his hand!!!." Stevens Decl. in Opp'n to King Mot., Ex. A at 58. GTMI closed on March 13, 2000 at $2.03 after trading as high as $4.76. King's next two postings, dated March 29 and April 4, were also positive. During this time, the stock dropped in value, losing about one third of its value. The stock closed on March 27 at $1.67, and on April 3 at $1.31. Thus, during the time King posted positive comments, the stock had already fallen from a closing high of $2.03 to a close of $1.31. *See generally id.*, Ex. B at 3-4 for share prices.

King posted his first negative comments on May 31. By that time, the stock had slipped even further to $0.68. Thus, prior to King's first negative posting, GTMI's stock had already dropped from a high of $2.03 to a low of $0.68--with no assistance from King. The stock then traded between $0.62 and $0.87 for the period May 31 through August 14. During the time, as the stock moved up and then down, King posted 23 messages, all negative and allegedly libelous. Even if his postings caused downward movements, which given the thousands of postings every day is unlikely, the stock altogether lost four cents (the difference between $0.68 and $0.64)--an insignificant drop compared to the loss in value represented by a drop between $2.00 and $0.68.

Looking more closely at that period of time, causation becomes even more problematic. For example, the stock moved from $0.78 to $0.62 between July 24 and August 14, 2000. During that same period, King posted once. Plaintiffs have not shown any correlation between King's posting and any loss in value, and the opposite conclusion is borne out: GTMI's stock lost significant value entirely unaided by King.

Similarly, damages cannot be shown with respect to Reader's statements. For example, his first negative posting is dated March 25, 2000. By that time, the stock had already dropped from a closing high of $2.67 on March 6 to closing of $1.62 on March 20. A week after his negative posting, the stock closed at $1.68, up six cents.

In sum, the Court finds that Plaintiffs have not satisfied their burden to show a probability of success on their claims for trade libel and defamation.[4]

2. Further Discovery

Plaintiffs argue that if the Court is inclined to grant Defendants' motions, it should stay the decision to allow Plaintiffs limited discovery regarding King's general experience in trading stocks, his over-all knowledge and sophistication regarding valuation of lower-dollar stocks such as GTMI, including the effect of "consumer" comments. Opp'n to King Mot. at , n2. In *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 985 (C.D. Cal. 1999), the court held that if a plaintiff requires discovery to oppose a motion brought under § 425.16, the hearing on the motion should be stayed until discovery is completed.

Here, Plaintiffs' request for discovery does not fall within the scope of *Rogers*. King's experience in trading is irrelevant to the questions raised in this motion, including issues of damage and whether the postings were fact or opinion. Having made the legal determination that the statements must be factual to be actionable, and having further found that the postings are opinions rather than actionable facts, the Court does not require further evidence to evaluate Plaintiffs' claims. Nor do Plaintiffs suggest that further facts are necessary to evaluate whether the postings are indeed fact or opinion. Similarly, Plaintiffs do not suggest any facts which may be relevant to determining the damage caused by the postings. Since both issues are dispositive of Plaintiffs' claims, no further discovery is necessary.

Plaintiffs' request for discovery is DENIED.

III. Disposition

The Court GRANTS Defendant King and Defendant Reader's Motions to Dismiss. The Court DENIES Plaintiffs' request for discovery.

IT IS SO ORDERED.
DATED: February 23, 2001

DAVID O. CARTER
United States District Judge

[1] As of September 2000, GTMI began trading as GLTI. All parties continue to refer to the company as GTMI. To avoid confusion, the Court will follow suit.

[2] Raging Bull is not a party to this action.

[3] The Court notes that Plaintiffs cite *Zhao v. Wong*, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (1996) for the proposition that "sensation" or media attention does not create an issue of public interest. *Zhao*, however, has been specifically disapproved by the California Supreme Court on exactly this point. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999) (disapproving *of* Zhao's reading of "public interest" as too narrow). The legislature amended § 425.16 in 1997 to specifically provide that the section "shall be construed broadly."

[4] Claims for interference with contractual relations and interference with prospective economic advantage also have a damage component. For the reasons noted here, Plaintiffs cannot show damages as a result of Defendants' postings, and therefore they cannot succeed on these causes of action.

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