UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re 2TheMart.com, Inc. Securities Litigation	Case No: Misc. Pending in C.D. California SACV-99-01127 DOC (AMx) **MEMORANDUM IN SUPPORT OF MOTION OF J. DOE TO QUASH SUBPOENA ISSUED TO SILICON INVESTOR/INFOSPACE, INC.**

Movant John/Jane Doe (hereinafter "Doe") used an internet bulletin board to post messages under the pseudonym "NoGuano." In this action, defendant 2TheMart.com, Inc. served a third party subpoena to InfoSpace Inc., the operator of the bulletin board, demanding that it disclose Doe's true identity. Doe asks this Court to quash the subpoena as it relates to Doe and the other anonymous speakers named in the subpoena ("the Does"), because it violates their First Amendment right to speak anonymously.

1 INTRODUCTION

The underlying litigation is a class action securities fraud case currently pending in US District Court for the Central District of California. The defendant corporation, 2TheMart.com, Inc. (hereinafter known by its ticker symbol "TMRT"), issued a subpoena seeking to have online service provider InfoSpace Inc. reveal the identities of twenty-three speakers who participated pseudonymously on Internet message boards operated by InfoSpace. *See* Exhibit A. The subpoena does not on its face explain why the identities of these speakers are relevant to the underlying dispute. Indeed, the nature of the suit makes their relevance unlikely. Under these circumstances, enforcement of a "fishing expedition" subpoena would terminate the speakers' First Amendment right to engage in anonymous speech without creating any corresponding benefit. Accordingly, this Court should quash the subpoena.[1]

The syndrome of third party civil subpoenas issued to Internet service providers seeking to breach the anonymity of their users is growing increasingly frequent. [2] It has rarely been subjected to judicial scrutiny, however, partly because of the short time frames typically involved in bringing a motion to quash and partly because many internet service providers do not notify their users before sacrificing their anonymity. This motion presents a good opportunity for the court to clarify that the test used in other settings where the First Amendment protects information against forced disclosure should also be used to evaluate third party subpoenas. The choice to speak anonymously should not be invalidated by judicial process unless it is clearly shown that specifically identified information about an anonymous poster is central to the claims of the party seeking the information, that those claims are viable, and that the party can acquire the information in no other manner.

2 STATEMENT OF FACTS

3 BACKGROUND REGARDING INTERNET BULLETIN BOARDS

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be to all who choose to read them. As the Supreme Court opined in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), "[f]rom the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of 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, . . . the same individual can become a pamphleteer." The government's ability to impinge upon speech is stringently limited on the Internet, just as it would be in a traditional public forum. *Id.*

To allow these town criers and pamphleteers to find each other, InfoSpace created a website called "Silicon Investor" that, in part, contains a series of electronic bulletin boards for the expression of user opinions around the central topic of investment in publicly-traded securities. The Silicon Investor web site, see www.siliconinvestor.com , features a series of message boards for various publicly-traded companies, and it permits anyone to post messages to these boards. While nothing prevents individuals from using their real names, most individuals who post messages on these boards generally do so under pseudonyms – similar to the old system of truck drivers using "handles" when speaking on their CB radios. Choosing one of these colorful monikers protects the speaker's identity, and such privacy generally encourages the uninhibited exchange of ideas and opinions. Silicon Investor has a privacy policy that states in part, "Individually identifiable information will not be released without that individual's prior consent." http://www.siliconinvestor.com/misc/privacy.gsp. Indeed, Silicon Investor will revoke service to anyone who uses its message boards to invade another's privacy. *See* http://www.go2net.com/corporate/legal/terms.html (terms of service).

An important aspect of message boards that distinguishes them from almost any other form of published expression is that a person who disagrees with statements on a message board can respond to them immediately at little or no cost, and that response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Publ'g. Co. v. Tornilllo*, 418 U.S. 241 (1974). Corporations and individuals can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. Because many people regularly revisit the same message boards, the response is likely to be seen by much the same

audience as the original criticism. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for resolution of disagreements about the truth of disputed propositions of fact and opinion.

4 THE SUBPOENA TO INFOSPACE

The underlying litigation is a class action securities fraud case where plaintiffs claim they were injured in their purchases or sales of TMRT securities as a result of fraudulent statements the defendants communicated to the investing public. The case relies largely on the fraud-on-the-market theory, which presumes that the market price of an efficiently-traded security fluctuates based on the information available to investors. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). As applied to Internet bulletin boards, the theory posits that a stock's price might change to the extent that investors choose to heed the information contained in pseudonymously authored messages. Because a pseudonymous message does not identify its author, the author's identity, if not otherwise known to investors from other sources, cannot affect stock price.

One of Silicon Investor's message boards pertains to TMRT. To 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 employees might do better. The messages posted on the Silicon Investor web site are archived, so that any user—including TMRT or its counsel—can read prior postings.

On January 24, 2001, TMRT served a subpoena from this Court upon InfoSpace, demanding that it reveal identifying information about twenty-three Silicon Investor users who preferred to identify themselves by pseudonyms like "The Truthseeker", "Edelweiss", and "NoGuano" (the latter used by Doe). *See* Exhibit A. Unlike some internet services who do not inform their users about subpoenas of this sort, InfoSpace notified the Does by e-mail of the subpoena and gave them time to file a motion to quash.

Prior to and during the time period covered by the TMRT securities litigation, Doe was a regular user of the Silicon Investor web site and discussed various companies on its bulletin boards. Review of the postings archived on the site shows that the user "NoGuano" has never posted on Silicon Investor's TMRT message board. Nonetheless, Doe's constitutionally protected choice to speak anonymously will be

sacrificed as part of TMRT's general fishing expedition if the subpoena is not quashed. The arguments outlined below would apply even if Doe had discussed TMRT on the Internet, perhaps even more forcefully. However, given that there is no known link between Doe and TMRT, the loss of First Amendment protection suffered in this case appears to have no countervailing benefit. Accordingly, Doe requests this Court quash the subpoena to the extent it calls for identification of all the Does, because its enforcement would violate their rights under the First Amendment.

5 SUMMARY OF ARGUMENT

Established First Amendment doctrine should determine the legal standard for determining whether a subpoena for the identity of a non-party Internet speaker violates the right to speak anonymously. This Court should make clear that the First Amendment rights of individuals like Doe are protected from discovery fishing expeditions in the absence of a genuine need that outweighs the constitutionally protected interest. As a court in this Circuit recently observed, "[p]eople 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 identities." *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing the standards for discovery of a defendants' identity in a domain name/trademark dispute). While this particular instance of third party Internet subpoenas in a securities fraud case is new, there is ample precedent for a court to reject the use of civil discovery tools where the disclosure of information would infringe another party's First Amendment interests. In these cases, courts balance the harm to the speaker against the party's proven need for the requested discovery.

6 ARGUMENT

7 THE COURT SHOULD QUASH THE SUBPOENA TO INFOSPACE BECAUSE IDENTIFYING THE DOES WOULD DESTROY THEIR RIGHT TO SPEAK ANONYMOUSLY

Petitioner seeks to use the subpoena power of this court to identify [3] an Internet speaker. This type of discovery directly destroys Doe's constitutional right to speak anonymously.

8 The First Amendment Protects the Right to Speak Anonymously

The Supreme Court has repeatedly upheld the First Amendment right to speak anonymously. *Buckley v. American Constitutional Law Found.* 119 S. Ct. 636, 645-646 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases celebrate the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy of the Federalist Papers. As the Supreme Court said in *McIntyre:*

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre, 514 U.S. at 341-342 (emphasis added).

Reno v. ACLU firmly established that Internet speech is fully protected under the First Amendment. Other cases have upheld the right to communicate anonymously over the Internet. *E.g*., *ACLU v. Johnson*, 4 F.Supp.2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (upholding preliminary injunction against New Mexico statute prohibiting dissemination of material "harmful to minors" on the Internet); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997) (granting preliminary injunction where parties likely to prove that Georgia criminal statute imposed unconstitutional content-based restrictions on their right to communicate anonymously and pseudonymously over the Internet).

At the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. The technology of the Internet is such that sending an e mail or visiting a website leaves behind an electronic footprint that can, if saved, provide the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power of the Courts to compel disclosure of information, can snoop on communications to learn who is saying what to whom. As a result, the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139.

9 Enforcing this Subpoena Would Violate Defendant's Substantive Constitutional Rights

TMRT asks this Court to enforce a subpoena to obtain Doe's identity, terminating once and for all Doe's right to speak anonymously. A court order, even when issued at the behest of a private party, constitutes state action subject to constitutional limitations, including the First Amendment. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). *See also Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgment of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461.

Due process requires the showing of a compelling interest where, as here, disclosure threatens to impair fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. *See also In re Grand Jury Subpoena: Subpoena Duces Tecum v. John Doe 819*, 829 F.2d 1291 (4th Cir. 1987) (court must strictly scrutinize subpoena that threatens to chill the exercise of First Amendment rights). The subpoena does not indicate on its face what compelling interest TMRT has in learning Doe's identity. The structure of the underlying litigation, however, suggests that there is no such interest. Fraud-on-the-market cases hinge on the defendants' knowledge, statements, and omissions as compared to publicly available information—which at all relevant times did not include the identities of the Does. There is even less reason for discovery as to Doe, given the absence of comments about TMRT from "NoGuano."

Whatever test this Court uses to evaluate the subpoena, it is clear that some evidentiary showing must be made by TMRT before there can be any order compelling production. *See Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). *Cf. Quad Graphics, Inc. v. Southern Adirondack Library System*, 664 N.Y.S.2d 225, 228 (NY Sup. Ct., Saratoga County 1997) (release of identities will not be compelled where doing so would breach protected interests and no criminal or civil charges have been filed).

10 THE COURT SHOULD APPLY A BALANCING TEST TO DETERMINE WHETHER TMRT'S NEED FOR DOE'S IDENTITY OUTWEIGHS DOE'S FIRST AMENDMENT RIGHT

TO SPEAK ANONYMOUSLY

Because compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous, the First Amendment creates a qualified privilege against disclosure. Although there is no precedent directly on point dealing with third-party subpoenas in securities fraud cases, this Court may rely on the rules in analogous situations where courts have rejected the use of civil discovery tools where the disclosure of information would be harmful to another party's First Amendment interests.

For example, courts have a great deal of experience with third party journalists subpoenaed for confidential information obtained in the course of reporting. Like a journalist, InfoSpace gathers otherwise confidential information during the normal scope of its activities. A journalist usually requires confidential information from speakers, both source information and facts, in order to ensure proper verification of a story. Similarly, in its normal technical administration of the message boards, InfoSpace gathers identifying information from those who use the message board. In both instances the information is gathered for a specific purpose that is unrelated to the subsequent litigation where the information is sought.

Furthermore, forcing the release of the information in both instances creates a chilling effect on the speech not only of the persons whose identity is revealed, but on many other persons as well. The risk underlying the journalists' privilege is that, faced with losing their anonymity, persons will refuse to talk to journalists. The risk here is that, faced with losing their anonymity, people will no longer participate in public message boards. Thus, the risk in failing to protect anonymity in both cases is the same: a chill on First Amendment protected expression.

To overcome the First Amendment privilege asserted by journalists when asked to reveal confidential information, the party seeking the discovery of the information must show "that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Farr v. Pitchess*, 522 F.2d 464, 464 (9th Cir. 1975). Stated alternatively, the question is whether "the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure." *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fl. 1995).

The test applicable to subpoenas issued to non-party journalists in civil cases is: (1) that the

information is of certain relevance; (2) that there is a compelling reason for the disclosure; (3) that other means of obtaining the information have been exhausted; and (4) that the information sought goes to the heart of the seeker's case. *Los Angeles Memorial Coliseum Commission, v. Nat'l Football League, et al*, 89 F.R.D. 489. (CD. Cal. 1981). *See also Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *United States v. Cuthbertson*, 630 F.2d 139, 146 149 (3d Cir. 1980) (qualified privilege recognized under common law).

In applying this privilege, the Ninth Circuit has recognized that "routine court-compelled disclosure of research materials poses a serious threat to the validity of the newsgathering process." *Mark v. Shoen*, 48 F.3d 412, 415-416 (9th Cir. 1995). Similarly, as noted above, routine court-compelled disclosure of identities of persons participating in message boards could pose a serious threat to the ongoing viability of these public discussions. Thus, given the similar First Amendment interests at stake, Doe maintains that the same public purpose served by the journalists' privilege will be served by applying this test to third party subpoenas seeking identifying information about anonymous speakers on publicly available message boards.

Courts have also limited the discovery of membership lists where a subpoena impermissibly burdens Defendants' constitutional right to freedom of association. The First Amendment protects individuals' right to associate because, as the Supreme Court has explained, "[t]he effective advocacy of public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. at 469. It is, moreover, "hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association." *Id.* at 462. The same is true regarding compelled disclosure of groups' other internal or confidential records. *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 204 (N.D. Cal. 1983) (documents reflecting group's "sources of financial support and the scope of its activities").

In the seminal case of *Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990) (decided on federal constitutional grounds), the Washington Supreme Court enunciated a similar two-step procedure for evaluating discovery requests against assertions of First Amendment associational privilege that seems especially appropriate here. First, once the party opposing discovery shows "some probability" that a discovery request "will harm its First Amendment rights," then the party seeking discovery must make a rigorous demonstration regarding the importance of the requested information. *Id.* at 164. The requester

must "establish the relevancy and materiality of the information sought, and [] make a showing that reasonable efforts to obtain the information by other means have been unsuccessful." *Id.* Second, if the party seeking discovery makes this initial showing, then "the trial court must balance [that party's] need for the information against the [opposing party's] claim of privilege and determine which is strongest. If *clearly* necessary, the trial court may make this [second] decision following an in camera inspection of the requested documents." *Id.* at 166 (original emphasis).

Both of the tests described above are consistent with a test recently applied in this circuit in a case where the plaintiff was seeking to identify an anonymous defendant who had registered an Internet domain name so they could pursue a trademark action. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). The court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus giving them an opportunity to defend their anonymity before the plaintiff could proceed with discovery against third parties who could identify them. The court also compelled the plaintiff to demonstrate that it had viable claims against the anonymous defendants. *Id.* at 579. Here, TMRT's subpoena does not seek the identity of a potential defendant, but instead, the identities of third parties who participated in Internet discussion about TMRT (or Doe's case, one who didn't). In addition, since the targets of the subpoenas are those who were exercising their First Amendment rights to comment on matters of public concern, and since they were doing so in the public forum of the Internet, the risk of a chilling effect from a less rigorous test is profound. To properly protect the rights of third parties to litigation, the court should apply a test that requires an *evidentiary* showing, such as that used in the journalist's privilege and membership lists contexts, when considering subpoenas issued to online service providers seeking identifying information about their subscribers when those subscribers are not parties to the pending litigation. The party seeking information should produce evidence and not merely rely on the pleadings.

11 CONCLUSION

Based upon the foregoing, Movant Doe respectfully requests that the motion to quash the subpoena be granted.

DATED this ___ day of _____, 2001.

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FOOTNOTES

1 If the subpoena is not quashed, the Court should, at a minimum, issue a protective order to limit access to the identity information to only the attorneys for the parties.

2 In Loudoun County, Virginia—the home of America Online, Inc.—70 of the 107 applications for subpoenas filed with the circuit court in the first four months of 1999 were directed to AOL information. Serving warrants on AOL is “almost a full-time job” for the Sheriff’s process server. Stephen Dinan, *Search Warrants Keep AOL Busy*, Wash. Times, April 27, 1999 at C4.

3 The term "identity" here refers to more than simply Doe's name. The subpoena covers all identifying information gathered by InfoSpace about its users, including address, credit card information, and so on. Since this information, singly or collectively can be easily used by Defendants to discover Doe's name, it should be withheld as well. For the remainder of this brief, the term "identity" includes all identifying information held by InfoSpace.

Please send any questions or comments to webmaster@eff.org.