

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RICHARD ULDRICKS

Plaintiff

vs.

JIM O'BRYAN, ET AL.

Defendants

CASE NO. CV-16-864148

JUDGE MICHAEL P. DONNELLY

**MOTION AND MEMORANDUM IN
SUPPORT OF NON-PARTY
RICKCITIZEN'S MOTION TO
QUASH AND FOR PROTECTIVE
ORDER
(ORAL ARGUMENT REQUESTED)**

* * * *

NOW COMES non-party "rickcitizen," by and through counsel, and hereby moves this Court to quash a subpoena *duces tecum* seeking rickcitizen's personal identifying information that has been issued by counsel for Plaintiff Richard Uldricks to Advance Ohio Media, LLC ("AOM"). Non-party rickcitizen further requests the issuance of a protective order preventing any further discovery seeking his identity.

I. INTRODUCTION

This libel suit stems from publications authored by Defendant Jim O'Bryan appearing in The Lakewood Observer and resulting blog post commentary appearing on its free online forum, the "Observation Deck" as well as other online forums. Plaintiff Richard Uldricks ("Uldricks") alleges Mr. O'Bryan and others defamed him, painted him in a false light or conspired against him through blog postings surrounding Lakewood political issues and matters

of public interest. Importantly, Uldricks admits to being a member of the media, employed by the "Cleveland Patch," an online news source, and managing a blog called the "Lakewood Citizen" as an adjunct to the Cleveland Patch. See, letter of Uldricks' counsel, Rachel Lyons, at p. 1, attached as Exhibit 2 to Affidavit of Matthew W. Nakon attached hereto as Exhibit A. Uldricks also admits that he has a previous conviction for telecommunications harassment. Complaint at ¶ 5. Although Uldricks' counsel paints him as having reformed, the fact is that Uldricks resigned his employment as a public official with the City of Lakewood (Building Inspector) with discipline pending as a result of harassment akin to that of his previous conviction. In this regard, Mr. Uldricks was believed to have sent harassing mailings to the homes of citizens who opposed his political agenda. See, Exhibit B. This lawsuit appears to be Uldricks' attempt to use a protected forum to continue to harass those who oppose his views.

On or about July 19, 2016, counsel for Uldricks issued the subpoena *duces tecum* to AOM, the parent company to Cleveland.com -- an online forum maintained and operated by The Cleveland Plain Dealer. See, Exhibit C. The subpoena demands that AOM produce information "indicating the names, identities and IP addresses," associated with the following user names, or close variations thereof, used on Cleveland.com:

- a. "Get a life"
- b. "icu4whatur"
- c. "rick citizen"
- d. "Wake Up Lakewood!"

This Motion is advanced on behalf of non-party rickcitizen, who, along with other anonymous participants have posted messages on Cleveland.com's message board regarding matters of political debate, including the closing of Lakewood Hospital and criticisms of city officials.¹

¹ Importantly, there are two different bloggers on Cleveland.com who use the name rickcitizen. First, there is "rickcitizen," who this Motion concerns. Second, there is another

Uldricks subpoena to AOM was issued without notice to the Court, any Defendant or the non-parties whose information was sought. Moreover, the subpoena did not request AOM to notify rickcitizen, the user whose information was sought, or anyone else, that Uldricks sought their identity. Thankfully, AOM did so anyway. Since that time, counsel has twice written to Uldricks' counsel seeking withdrawal of the subpoena. Affidavit of Matthew W. Nakon, Esq., Exhibits 1 and 3. Uldricks' counsel has not responded to rickcitizen's most recent attempt, but the undersigned has been advised that at the Case Management Conference held on August 23, 2014, Uldricks' lead counsel advised those defense counsel attending that "rickcitizen" should "file his motion."

Accordingly, rickcitizen now moves to quash the subpoena issued to AOM and seeks a protective order against future similar discovery, because it has been issued as part of an untenable lawsuit in a transparent effort to intimidate internet users who oppose Uldricks' agenda and to chill constitutionally protected speech. As noted by one federal district court.

People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

Unfortunately, neither the Complaint, the subpoena, nor counsel's letter (attached as Exhibit 2 to the Affidavit of Matthew W. Nakon, Esq.) identify the purpose for which Uldricks seeks the identity of rickcitizen. There are no claims advanced against "rickcitizen" in the Complaint. In fact, the only mention of him in the Complaint is a misidentification of "rickcitizen" as being one of many identities used by Defendant "Jane Doe," along with other pseudonyms such as "Wake Up Lakewood!," "URAUser," "Irish Eyes" and "Borneo." Non-blogger "rick citizen" that is identified in the subpoena. Movant's pseudonym is a close variation.

party rickcitizen is a male and has never used any of the pseudonyms attributed to Defendant Jane Doe in the Complaint. Plainly, Uldricks' counsel is mistaken as to "rickcitizen's" identity. However, when notified of such, counsel created new theories -- that rickcitizen cast Uldricks in a false light or impersonated him -- neither of which is advanced in the Complaint or is actionable in this instance. Fatal to Uldricks' claims is the fact that not a single blog post or statement contained in the Complaint (or attached as an exhibit) is attributed to "rickcitizen." Hence, neither the Complaint, the Subpoena, nor counsel's letter provide any basis upon which the anonymity of rickcitizen should be disturbed.

Because the First Amendment guarantees a right to speak anonymously as part of the right to free speech, courts across the country, including Ohio, have applied a heightened level of scrutiny and required a substantive demonstration of a basis before stripping internet bloggers of their anonymity. See, *SPX Corp. v. Doe*, 253 F.Supp.2d 974 (N.D. Ohio 2003). Having failed to advance a single cause of action against rickcitizen and having failed to offer any purported statement of rickcitizen that constitutes libel or supports a tort claim, Uldricks is not entitled to the discovery he seeks. Should Uldricks advance any claims against rickcitizen, counsel is prepared to file a motion to dismiss the same.

II. STATEMENT OF FACTS

A. The Cleveland.com and Observation Deck Message Boards.

The internet is a democratic institution in the fullest sense. The United States Supreme Court has described it as "vast democratic fora" and "the most participatory form of mass speech yet developed" that "is entitled to the highest protection." *Reno v. ACLU*, 521 U.S. 844, 863 (1997). As the Supreme Court further noted:

Through the use of chatrooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap box. Through the use of Webpages, ...the same individual can become a pamphleteer.

Id. at 853.

In the 20 years since the *Reno* decision, message boards on matters of public debate have become commonplace. Knowing that people engage in political commentary, newspapers, local and national, host message boards to invite posts regarding matters of political interest and as an outlet for the expression of opinions. Uldricks has advanced claims in this action alleging Defendant O'Bryan maintained editorial control over a message board called "Observation Deck," a forum sponsored by Defendant The Lakewood Observer, Inc. Complaint, ¶ 16. Uldricks further acknowledges that "Observation Deck" is billed as a "place where good neighbors meet to talk over the digital fence" and that posts made on political topics are often inflammatory and personal. Plaintiff's Complaint, ¶ 17. Similarly, The Cleveland Plain Dealer hosts various message boards on its Cleveland.com website concerning matters of political debate where some of the bloggers at issue herein made anonymous posts.

Uldricks was an active participant in Lakewood political debates including the plan to close Lakewood Hospital as an inpatient facility and a further plan, in conjunction with the Cleveland Clinic Foundation, to build an outpatient family health center adjacent to the current hospital site. Complaint, ¶ 25. Uldricks acknowledges that the proposal was controversial and spurred significant public debate. Complaint, ¶ 26. However, Uldricks contends that Defendants O'Bryan, The Lakewood Observer, John Doe and Jane Doe defamed him in their blog posts, caused him emotional distress and cast him in a false light as part of a civil conspiracy to injure him. Non-party, "rickcitizen" is not Defendant O'Bryan, or the Lakewood Observer, and based on the allegations of the Complaint, is not John Doe or Jane Doe. Uldricks describes Defendant John Doe as using the screen name "Celeron896" and the screenname "icu4whatur." Non-party rickcitizen is not John Doe and has never used the

screennames Uldricks attributes to John Doe. Defendant Jane Doe has been identified by Uldricks as using the screen names "Wake Up Lakewood!," "URAUUser," "Irisheyes," "Rick Citizen" and "Borneo." Non-party rickcitizen is not a female and has never used any of the user names to which Plaintiff attributes to Jane Doe, but has used the name "rickcitizen," a close variation of rick citizen. Moreover, while Uldricks attaches several posts he claims to be authored by Jane Doe and/or John Doe, none of the posts referenced in the Complaint or the attachments are attributed to rickcitizen. Despite being provided two opportunities after issuing the subpoena, Counsel for Uldricks has yet to identify any statement or blog post of rickcitizen which Uldricks claims to be actionable.

Uldricks' subpoena to Cleveland.com should be quashed to the extent the same requests any information regarding rickcitizen. Uldricks has not advanced any claim against rickcitizen in this lawsuit, nor has Uldricks identified a single purportedly defamatory or tortious posting. Moreover, Uldricks could have no valid defamation claim against rickcitizen. Like most postings concerning the Lakewood Hospital closure on Cleveland.com or the "Observation Deck," rickcitizen's postings are hyperbole, opinion or question other blogger's posts -- all of which are protected under the First Amendment to the United States Constitution and/or the Ohio Constitution. Rather, Uldricks is using this lawsuit and the subpoena in an effort to intimidate and harass rickcitizen and other internet users to chill their constitutionally protected speech against the closure of Lakewood Hospital and other matters of political debate in the City of Lakewood.

III. ARGUMENT

It is clear from the pleadings that Uldricks believes rickcitizen to be someone else. Uldricks identifies numerous posts attributed to other anonymous online commenters, but none to rickcitizen. Uldricks' qualms are with those posters -- not with rickcitizen. The Complaint, on

its face, fails to state a claim that would survive a motion to dismiss and thus, Uldricks has no basis to obtain rickcitizen's true identity.

A. RickCitizen is Entitled to Anonymous Speech by the United States and Ohio Constitution, and his Posts are Wholly Protected as a Form of Expressive Opinion.

The freedom of speech is the most important and all-encompassing right guaranteed to each citizen by the First Amendment. Anonymous speech is no less protected by the First Amendment than speech that identifies the speaker. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Supreme Court noted:

[A]n author generally is 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, at least in the field of literary endeavor, 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.

Id. at 341-342.

Anonymity has long been a staple of the American political forum. With the advent of the internet, the methodology of anonymous speech has merely changed form. Such a change, however, does not sacrifice the protections and guarantees of the First Amendment before anonymity is lost. *See Reno, supra*. As such, an individual is entitled to the privileges of anonymous internet speech by the First Amendment; and while "there is no blanket protection for [anonymous] statements made on an internet message board," a plaintiff must supply the court with facts that would substantiate a claim prior to a loss of anonymity. *SPX Corp.*, 253 F.Supp.2d at 981-982 (N.D. Ohio 2003).

Here, rickcitizen did no more than post statements of opinion on a blog dedicated to issues of political debate. Even had Uldricks had made some allegation as to rickcitizen, the fact remains that nothing posted by rickcitizen is actionable, as each post was made in a forum hosting political debate and constitutes an opinion, protected by the Ohio Constitution. Opinions, even those that Uldricks fails to identify, cannot substantiate a claim for defamation, as the Ohio Constitution provides individuals with the privilege to voice their opinions without fear of liability. "[E]xpressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press." *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280 (1995), citing *Scott v. News-Herald*, 25 Ohio St.3d 243, 244-245 (1986). In pertinent part, the Ohio Constitution provides:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Art. I, § 11. "The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press." *Vail*, 72 Ohio St.3d at 281. Because any post made by rickcitizen is an obvious expression of opinion, the subpoena is an unconstitutional infringement on rickcitizen's right to anonymous free speech. The information that Uldricks seeks is privileged and not susceptible to discovery based on Uldricks' ill-conceived Complaint.

B. Non-Party, rickcitizen, has standing to Challenge the Subpoena to AOM.

Uldricks' counsel has asserted in letters to counsel (and in opposing another motion to quash) that absent some claim of privilege, only persons served with a subpoena have standing to challenge the subpoena under Civ.R. 45. Simply stated, such a privilege exists here. Civil Rule 45 outlines defenses against the execution of a subpoena. Civ. R. 45(C)(3) provides:

On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or

production only under specified conditions, if the subpoena does any of the following:

b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies.

[Emphasis added.]

A party thus has standing to oppose a subpoena where the execution thereof would disclose privileged information, especially where the disclosure of such information may result in irreversible injury. *See generally, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Civil Rule 45(C)(3) creates several categories of injuries that provide standing for non-parties to a subpoena to oppose the same. Civ.R. 45 further notes that "[n]othing in this rule shall be construed to authorize a party to obtain information protected by any privilege recognized by law, or to authorize any person to disclose such information." Civ.R. 45(F). Clearly, the rule recognizes the importance of the protection of privileged information.

An author's decision to remain anonymous, as an aspect of the freedom of speech, is a right and privilege protected by the First Amendment. *McIntyre*, 514 U.S. 334 at 341-342. Thus, rickcitizen has a right and privilege under Civ.R. 45(C)(3)(b) that creates standing to oppose the subpoena issued to AOM. Uldricks' position that only those commanded to appear or produce may challenge has been roundly criticized and disregarded. For example:

[This] conclusion does not seem to be demanded by the language of Civ. R. 45(C)(3) and seems dubious as a matter of policy: there seems to be no principled reason why a holder of a privilege should be unable to move to quash or modify a subpoena that threatens that privilege.

Distinguished commentators on the similar Federal Rule 45(c)(3) note that, although a motion to quash is normally 'made by the person from whom the documents or things are requested' and that '[o]rdinarily, a party has no standing to seek to quash a subpoena issued to someone who is not a party to that action,' **a party is**

allowed to move to quash if 'the party claims some personal right or privilege with regard to the documents sought.' 9A Charles A. Wright & Arthur A. Miller, *Federal Practice & Procedure (Civil)* § 2459. See *Bellamy v. Montgomery*, 188 Ohio App.3d 76, 2010-Ohio-2724, 934 N.E.2d 403 (10th Dist. Franklin County 2010) (plaintiff moved under Civ. R. 45(C) to quash subpoena to tax commissioner).

2 Baldwin's Oh. Prac. Civ. Prac. 45:16, fn. 1.50 (West 2016) (emphasis added).

The federal courts of Ohio have held the same: while "[a] party generally lacks standing to seek to quash a subpoena issued to a nonparty...**a party has a right to object to a subpoena if he/she has a claim of privilege with respect to the materials being sought by the subpoena.**" *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, fn.1 (S.D. Ohio 2011) (citations omitted) (emphasis added); see also *Lester v. Wow Car. Co., Ltd.*, 2013 WL 6018537, *3 (S.D. Ohio, Nov. 13, 2013) ("Although a party generally lacks standing to seek to quash a subpoena issued to a nonparty, an exception is made if the information sought implicates a party's personal right or privilege.").

Non-party, rickcitizen's protected right to anonymous speech would be irreversibly injured if the court were to permit disclosure of his identity. The importance of this privilege has been recognized not only by Ohio Courts, but the United States Supreme Court as well. See, *McIntyre, supra*. Ohio Courts, in protecting the privilege of a non-party to the subpoena, have found standing and allowed motions under far less convincing factual circumstances than those here involved. See, *In re Deposition of Turvey*, 2002 WL 31455155, 2002-Ohio-6008 (3d Dist.) (Court permitted hospital to quash subpoena served on its medical staff coordinator); *Chiasson v. Doppco Dev., LLC*, 8th Dist. No. 93112, 2009-Ohio-5013 (Court permitted employer to quash subpoena served on its outside IT administrator); *Hoerig v. Tiffin Scenic Studios, Inc.*, 2011-Ohio-6103 (3d Dist. Nov. 28, 2011) (Court permitted employer to quash subpoena served on its employee); *Black v. Kyle-Reno*, 2014 WL 667788, *1, fn. 1 (S.D.

Ohio, Feb. 20, 2014) (finding that a non-party had standing to quash a subpoena for her education records and holding; "Although plaintiff is a nonparty to the subpoenas, she has standing to challenge the disclosure of information as to which she possesses a claim of privilege or personal right."); *Valentine v. Remke Markets Inc.*, 2012 WL 893880, *1, fn. 1 (S.D. Ohio, Mar. 15, 2012) ("Plaintiff, a nonparty to the subpoena, has standing to challenge the subpoena seeking his employment records as he possesses a personal right to the information contained in such employment records."). Most importantly, Judge Manos, in the matter of *SPX Corp. v. John Doe*, specifically permitted a challenge to a subpoena seeking the identity of a third-party, blog poster, holding that *SPX* must first establish a valid claim. 253 F.Supp.2d 974 (N.D. Ohio 2003).

In opposing a motion to quash submitted by non-party icu4whatur, Uldricks cites to a number of cases that anonymous internet users do not have a reasonable expectation of privacy, and thus have waived their privilege to anonymity. Those cases, however, are so factually distinguishable that they have no applicability here. In both *Riding Films, Inc. v. Doe*, 2013 WL 3322221 (S.D. Ohio, July 1, 2013) and *TCYK, LLC v. Doe*, 2013 WL 4805022 (S.D. Ohio, Sept. 9, 2013), the plaintiffs sought the identity of John Doe defendants in order to bring copyright claims against them.² Copyright claims differ significantly from defamation and tort claims, and thus receive different protection. In copyright cases:

A person's identity is not privileged or protected in the face of accusations of copyright infringement. Although **individuals may have a First Amendment right to engage in anonymous speech on the internet**, these protections do not extend to shield the identity of persons involved in (or accused of involvement in) copyright infringement.

² Since Uldricks failed to provide these unreported cases to which he cited, rickcitizen attaches them hereto.

Thompsons Film. LLC v. Does 1-44, 2013 WL 4046404,*1 (N.D. Ohio, Aug. 8 2013). This is not a copyright case. The provision of basic user information to an internet service provider cannot equate to a waiver of a user's First Amendment right to anonymous speech.

C. At the Very Least, this Court Should Require Uldricks' to Assert Claims Against rickcitizen that can Withstand a Motion to Dismiss Before Uldricks Should be Permitted to Discover rickcitizen's Identity.

In *SPX Corp. v. Doe*, Judge Manos, without explicitly stating as such, adopted a test favored by most jurisdictions when a subpoena seeks the identity of an anonymous internet speaker. There, John Doe Defendant made an anonymous posting on a web page dedicated to analysis of a company's stock. Taking offense to the comment, the company subpoenaed the internet service provider for information that identified John Doe. The provider refused and notified John Doe of the subpoena. Upon John Doe moving to quash the subpoena on the grounds that the subpoena violated his rights to anonymous speech, the court, recognizing legitimate competing interests, reserved opinion on the motion to quash and "concluded that the various competing interests were best balanced by entertaining a motion to dismiss prior to permitting discovery which would reveal the defendant's identity." *Id.* at 977. Thereafter, the court dismissed the complaint.

At the very least, this court should adopt the procedure used in *SPX Corp. v. Doe* - a standard which is equivalent to or even lower than that of many jurisdictions facing the same question. See, *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Sinclair v. TubeSockTedD*, 2009 WL 320408 (D.D.C. Feb. 10, 2009); *A.Z. v. Doe*, 2010 WL 816647 (N.J. Super. Ct. App. Div. Mar. 8, 2010); *Swartz v. Doe*, No. 08C-431 (Tenn. Cir. Ct. Oct. 8, 2009); *Krinsky v. Doe 6*, 159 Cal.App. 4th 1154 (Cal. Ct. App. 2008); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp.2d 1205 (D. Nev. 2008); *Mobilisa v. Doe*, 170 P.3d 712, 720-21

(Ariz. Ct. App. 2007); *Greenbaum v. Google*, 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007); *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007); *Reunion Indus. v. Doe*, 2007 WL 1453491 (Penn. Ct. Comm. Pleas Mar. 5, 2007); *McMann v. Doe*, 460 F. Supp.2d 259, 268 (D. Mass. 2006); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite International v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001). Minimally, Uldricks should be required to advance some claim against rickcitizen which is capable of surviving a Civ. R. 12(B)(6) Motion before discovery is permitted as to rickcitizen's identity. Because Uldricks has not made and cannot make a prima facie claim, the subpoena should be quashed.

1. Assuming Uldricks Suggests he Possesses a Claim Against rickcitizen for Defamation, the Same Could Not Survive a Motion to Dismiss for Failure to State a Claim.

Uldricks can point to no statement of rickcitizen as defamatory as Uldricks does not attribute any objectionable post to rickcitizen in the Complaint. Any claim for defamation would fail at this very first step. Uldricks cannot be entitled to discovery of an anonymous speaker's identity where he has not even identified any statement attributable to the anonymous speaker. If Uldricks were able to discover the identity of an anonymous critic based on "beliefs" and "theories," "[t]he possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

a. Uldricks Cannot Establish Even the First Element of a Defamation Claim Against rickcitizen.

i. Legal standard for evaluating claims for defamation.

"[D]efamation occurs when a publication contains a false statement made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her

trade, business or profession." *Jackson v. Columbus*, 117 Ohio St.3d 328, 331 (2008), citing *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St.3d 1, 7 (1995). A prima facie case for defamation requires a showing of: 1) ***an assertion of a false and defamatory statement of fact***; 2) that such statement was published; 3) that such publication was the proximate cause of injury to the plaintiff; and 4) that the defendant acted with a requisite degree of fault. *Celebrezze v. Dayton Newspapers, Inc.*, 41 Ohio App.3d 343, 346-347 (8th Dist. 1988); see also *Vail*, 72 Ohio St.3d at 282 (1995).

Failure to establish a statement as asserting a fact, rather than expressing an opinion, results in a failure of the claim. See e.g. *Id.* at 347. Whether or not a statement is an expression of an opinion or an assertion of fact is a question reserved for the court. *Scott*, 25 Ohio St.3d at 250 (1986). In determining whether a statement is an assertion of fact or an expression of opinion, the court looks at the totality of the circumstances of the case, focusing primarily on four factors: "1) the specific language used; 2) whether the statement is verifiable; the written context of the statement; and 4) the broader social context in which the statement was made." *SPX Corp.*, 253 F.Supp.2d at 979, citing *Scott*, 25 Ohio St.3d at 250.

ii. Because Plaintiff fails to provide any allegedly defamatory statement from rickcitizen, the specific language cannot weigh in favor of the statement supporting a claim.

Uldricks' failure to allege that any of rickcitizen's statements were defamatory or to include ***a single statement*** attributed to rickcitizen in his Complaint stymies Uldricks' attempt to discover rickcitizen's identity. Even were Uldricks to later identify a statement, the court "must determine whether a reasonable reader would view the words used to be language that normally conveys information of factual nature or hype and opinion; whether the language has a ready and ascertainable meaning or is ambiguous," rather than attempting to determine the intent of the author. *Vail*, 72 Ohio St.3d at 282; see also *McKimm v. Ohio Elections Commission*, 89

Ohio St.3d 139, 144-145 (2000). The words used are to be given their common and ordinary meaning. *Scott*, 25 Ohio St.3d at 250. Figurative, hyperbolic, sarcastic, and instigative language are afforded an inference of opinion. Language that "would be understood by the ordinary reader for just what it is -- one person's attempt to persuade public opinion" is not a statement of fact. *Vail*, 72 Ohio St.3d at 282-283.

Uldricks' failure to include any posts attributed to rickcitizen renders any defamation claim hopeless. Even so, any post to which Uldricks may attempt to point, will be no different than the language found to be an opinion in *Vail* -- colorful language used in an attempt to sway public opinion, not an assertion of a false fact.

iii. For the reasons discussed above, the verifiability of the allegedly defamatory statements by rickcitizen is undeterminable, and thus must militate in rickcitizen's favor.

It is impossible to verify a statement which has not been presented to the court. Absent a plausible method of verification, a reasonable reader will not believe that statement to been an assertion of fact. *Vail*, 72 Ohio St.3d at 283. Since the court cannot verify a statement that does not exist, this factor must militate in rickcitizen's favor.

iv. The content of any statement made by rickcitizen would have been made in an internet blog relating to matters of contentious public concern.

Measuring context requires consideration of the alleged defamation in the context of other accompanying statements. "Cautionary terms or 'language of apparency' weigh against liability. Also important is the tenor, including whether the statements appear in a piece characterized by objective facts or subjective hyperbole." *SPX Corp.*, 253 F.Supp.2d at 981 (citations omitted). Any statement which Uldricks may claim to be defamatory was made in the context of a message board hosted by Cleveland.com or the Lakewood Observer regarding matters of political debate. Such forums are typically subjects for political hyperbole and as

such, highly discounted against a finding of defamation. The purpose of any posting was to cast an anonymous opinion on local occurrences. Furthermore, the tenor of any posting was not consistent with an assertion of fact. The language used by rickcitizen in all posts was figurative hyperbole -- not an assertion of fact. *The adoption of a pseudonym or screenname like "rickcitizen" itself should inherently diminish credibility as a factual source.* In context, any reasonable reader would view the statements as subjective and personal opinions, and not as reliable facts.

v. The broader social context of any statement which Uldricks might claim as defamatory militates in favor of rickcitizen.

The fourth consideration, the broader social context in which any statement would have been made, also lends itself to a finding against defamation. "Different types of writing have * * * widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion. To evaluate an article's broader context we must examine the type of article and its placement and how those factors would influence the reader's viewpoint on the question of fact or opinion." *Scott*, 25 Ohio St.3d at 253, quoting *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (citation omitted). **"Statements appearing in such locations as forum and commentary newspaper sections, or other venues often associated with "cajoling, invective, and hyperbole," are more likely opinion."** *SPX Corp.*, 253 F. Supp.2d at 981, citing *Vail*, 72 Ohio St.3d at 282. Here, each of rickcitizen's postings were posted on an internet message board. "Such message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with internet access, an[d] no one exerts control over the content. Pseudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as "facts" when placed on such an open and uncontrolled forum." *SPX Corp.*, *supra*. As such, this factor -- as with every other factor to be

considered in determining whether a statement is of opinion or of fact -- must militate in rickcitizen's favor.

2. Plaintiff Cannot State A Claim For False Light Invasion Of Privacy.

Ohio recently recognized false light invasion of privacy as a cause of action. *Welling v. Weinfeld*, 113 Ohio St.3d 464 (2007). In establishing this cause of action, the Supreme Court held:

In Ohio, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if a) the false light in which the other was placed would be highly offensive to a reasonable person, and b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id.; see Restatement (Second) of Torts, Section 652E (1977).

To substantiate a claim for false light invasion of privacy, Uldricks would have to identify some action or statement made by rickcitizen that cast Uldricks in a **"false light"** that would be **"highly offensive to a reasonable person."** This claim too would fail because Uldricks has failed to identify anything that rickcitizen has done that could substantiate this claim. Apparently, Uldricks believes that people could mistake rickcitizen for himself, and because rickcitizen appears to espouse political views inapposite to Uldricks' actual views, a claim for false light invasion of privacy is warranted. Such a belief is ludicrous. The perception of one's political beliefs is not "highly offensive to a reasonable person."

When the Supreme Court recognized the false-light theory, it considered the exact situation here: a "person with hurt feelings clogging to the courthouse." *Welling*, 113 Ohio St.3d at 471. As noted by the court, a false light invasion of privacy claim cannot be substantiated by a bruised ego. "The requirements imposed by the restatement make a false-light claim difficult to

prove." *Id.* In adopting the Restatement, the court noted what it means for something to be highly offensive to a reasonable person.

The rule stated in this Section applies only when the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. *** The plaintiff's privacy is not invaded *** when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

Id. at 472, quoting Restatement (Second) Torts, Section 652E, Comment c.

Uldricks clearly cannot meet this strict standard under any factual circumstance he has presented to this court and cannot substantiate a claim for false light invasion of privacy. Thus, his subpoena for rickcitizen's identity should be quashed.

IV. CONCLUSION

For these reasons, Uldricks' subpoena to Advance Ohio Media should be quashed to the extent the same seeks the identity of rickcitizen and a protective order should be issued preventing Uldricks from pursuing related discovery.

Respectfully submitted,

/s/Matthew W. Nakon

Matthew W. Nakon (No. 0040497)

E-mail MNakon@WickensLaw.com

William F. Kolis, Jr. (No. 0011490)

E-mail WKolis@WickensLaw.com

WICKENS, HERZER, PANZA, COOK & BATISTA CO.

35765 Chester Road

Avon, OH 44011-1262

(440) 695-8000 (Main) (440) 695-8098 (Fax)

ATTORNEYS FOR NON-PARTY, ADVANCE OHIO
MEDIA, LLC

PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion and Memorandum in Support of Non-Party rickcitizen's Motion to Quash and for Protective Order (Oral Argument Requested) has been sent via the Court's electronic filing system, on this _____ day of August, 2016, to:

Angela M. Lavin, Esq.
Rachel E. Lyons, Esq.
Wegman, Hessler & Vanderburg
A Legal Professional Association
6055 Rockside Woods Boulevard, Suite 200
Cleveland, OH 44131-2302

Donna J. Taylor Kolis, Esq.
17893 Lake Road
Lakewood, OH 44107-1046

Richard A. Di Lisi, Esq.
Nationwide Insurance
Two Summit Park Drive, Suite 540
Independence, OH 44131-2590

Thomas G. Haren, Esq.
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Westlake, OH 44145-2397

/s/Matthew W. Nakon

Matthew W. Nakon
William F. Kolis, Jr.

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RICHARD ULDRICKS

Plaintiff

vs.

JIM O'BRYAN, ET AL.

Defendants

CASE NO. CV-16-864148

JUDGE MICHAEL P. DONNELLY

**AFFIDAVIT OF MATTHEW
NAKON, ESQ.**

* * * *

STATE OF OHIO

COUNTY OF CUYAHOGA

)
) SS:
)

Matthew W. Nakon, Esq., after being first duly sworn according to law, deposes and states as follows:

1. I am of the age of majority and competent to testify as to the factual matters set forth herein. Unless specifically stated otherwise, I have personal knowledge of the facts set forth in this Affidavit.

2. I represent rickcitizen, who wishes to have his identity remain anonymous.

3. On or about July 19, 2016, Plaintiff Uldricks subpoenaed Advance Ohio Media, LLC for "any and all information, whether in printed or electronic format, indicating the

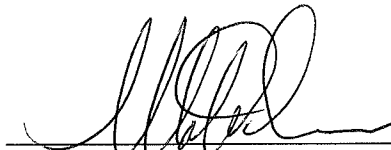
names, identities and IP addresses, associated with the following usernames, or close variations thereof, used on Cleveland.com:... rick citizen."

4. Promptly after learning of the subpoena, I, acting as counsel for rickcitizen, wrote to Plaintiff's counsel in an effort to resolve any claims Plaintiff might think he has against rickcitizen. See Exhibit 1.

5. Plaintiff's attorney rebuked my attempt to resolve the issue by instead advancing allegations against rickcitizen that were not specific and were not in the Complaint. See Exhibit 2.

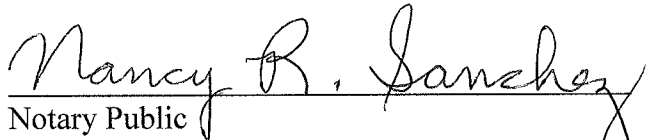
6. I then attempted again to obtain Plaintiff's withdrawal of the Subpoena. See Exhibit 3. I was told by other defense counsel that Plaintiff's counsel stated at the August 23, 2016, Case Management Conference that Plaintiff would continue to pursue the Subpoena issued to Advance Ohio Media and that I should file a Motion to Quash.

Further affiant sayeth naught.


Matthew W. Nakon

Sworn to before me and subscribed in my presence this 1st day of September, 2016.

NANCY R. SANCHEZ
Notary Public - State of Ohio
My Commission Expires 8/29/20


Notary Public

Matthew W. Nakon

Attorney at Law



35765 Chester Road

Avon, OH 44011-1282

Direct: (440) 695-8051

Email: MNakon@WickensLaw.com

Main: (440) 695-8000

Fax: (440) 695-8098

Web: www.WickensLaw.com

August 10, 2016

VIA EMAIL: jruggier@advance.net

Jennifer Ruggieri

Director of Engagement/Advance Digital

VIA U.S. MAIL

Advance Ohio Media, LLC

c/o CSC-Lawyers Incorporating Service

50 West Broad Street, Suite 1800

Columbus, OH 43215

RE: *Richard Uldricks vs. Jim O'Bryan, et al.*; Cuyahoga County Court of Common Pleas,
Case No. CV-16-864148

Dear Ms. Ruggieri:

This correspondence shall address the Subpoena issued to Advance Ohio Media, LLC (the corporate parent of Cleveland.com) seeking the disclosure of information regarding my client, "Rick Citizen." A copy of the subpoena is attached as Exhibit A. As set forth in my correspondence of August 4, 2016, Rick Citizen does not consent to the disclosure of any information regarding his identity and expects that his constitutional right to blog anonymously concerning matters of public debate will be protected by Cleveland.com. Accordingly, Rick Citizen requests that Advance Ohio Media, LLC refuse production of any materials regarding Rick Citizen's identity and defends against any attempts to enforce the subpoena.

As I am sure you are aware, the First Amendment guarantees to citizens a right to speak anonymously as part of their right to free speech. Accordingly, the courts of Ohio have applied a heightened level of scrutiny and required a substantive basis before stripping internet bloggers of their anonymity. *See, SPX Corp. v. Doe*, 253 F.Supp.2d 974 (N.D. Ohio 2003). Unfortunately, neither the Complaint in the underlying action,¹ nor the Subpoena, identify the purpose for which counsel for Richard Uldricks seeks the identity of Rick Citizen. There are no claims advanced against "Rick Citizen" in the Complaint and the only mention of him is a misidentification of "Rick Citizen" as being an identity used by Defendant "Jane Doe," along with other pseudonyms such as "Wake Up Lakewood!," "URAUUser," "Irish Eyes" and "Borneo." Rick Citizen is a male and has never used any of the pseudonyms attributed to Defendant Jane Doe in the Complaint. Mr. Uldricks' counsel is obviously mistaken as to "Rick Citizen's" identity. Moreover, not a single blog post or statement contained in the Complaint (or attached as an exhibit) is attributed to "Rick Citizen." Hence, neither the Complaint, nor the Subpoena, provide any basis upon which the anonymity of Rick Citizen should be disturbed.

¹ The Complaint and attachments are sizeable, so I have not attached a copy. I would be happy to supply the Complaint by email if you would like to see it.

Jennifer Ruggieri
Advance Ohio Media, LLC
August 10, 2016
Page 2

Equally concerning is the fact that the Complaint identifies that the Plaintiff (Richard Uldricks) "pled guilty to one count of misdemeanor telecommunications harassment, in violation of R.C. 2917.21." Complaint at ¶ 5. Yet, Mr. Uldricks (through counsel) now seeks "any and all information, whether in printed or electronic format, indicating the names, identities and IP addresses" associated with Rick Citizen and others. Rick Citizen opposes the unprotected provision of his identity and IP address by Advanced Media to anyone, especially someone who has pled guilty to telecommunications harassment.

Simply stated, because Mr. Uldricks' has not provided any justification for Advance Media to identify my client, Rick Citizen demands that Advance Media refuse to provide the requested information, and notify Mr. Uldricks' counsel that specificity will be required with respect to the substantive basis for which his personal information is sought. Please copy me on any and all pleadings that your client files to protect Rick Citizen's identity. Moreover, I further demand that Advance Media provide no less than 48 hours notice before providing any information to Mr. Uldricks' counsel. I have copied Mr. Uldricks' counsel on this correspondence in the event counsel wishes to address this issue directly with me.

Very truly yours,

WICKENS, HERZER, PANZA, COOK & BATISTA CO.



By: Matthew W. Nakon
Attorney at Law

MWN/cmk

cc: Ms. Rachel Lyons

August 17, 2016

Via E-mail Only (MNakon@WickensLaw.com)

Mr. Matthew W. Nakon, Esq.
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, Ohio 44011

Re: Advance Ohio Media, LLC (Cleveland.com) Subpoena
Richard Uldricks v. Jim O'Bryan, et.al.
Cuyahoga County Court of Common Pleas, Case No.: CV-16-864148

Dear Mr. Nakon:

In response to your letter of August 10, 2016, I ask that you and your client reconsider your stance on responding to the subpoena issued to Advance Ohio Media, LLC.

I understand and appreciate that the First Amendment guarantees citizens' right to speak anonymously, just as I'm sure you appreciate that there are limitations to that right. Libel, harassment, impersonation, and subjecting another to unwanted publicity have never been protected forms of speech. And, while I agree that your client, "Rick Citizen," has the right to criticize Lakewood city officials anonymously, he or she does not have the right to attribute that criticism, and the style in which it is made, to my client, Rick Uldricks.

If you've reviewed the complaint, you understand that Mr. Uldricks filed this action to address a persistent course of online harassment across multiple online platforms. A common tactic has been to accuse Mr. Uldricks of posting under "fake" names and to associate him with bizarre and inflammatory statements that are not his.

Mr. Uldricks is employed by the Cleveland Patch, an online news source, and manages a blog called the "Lakewood Citizen" as an adjunct to the Patch. The person or persons who have been harassing and libeling Mr. Uldricks are well aware of his association with the Lakewood Citizen, and they frequently refer to it in their attacks on Mr. Uldricks. Therefore, absent some evidence to the contrary, we have difficulty accepting the contention that your client chose "Rick Citizen" innocently and without reference to Mr. Uldricks.

Your client's conduct constitutes invasion of privacy and false light invasion of privacy, and violates R.C. §2917.21 (telecommunications harassment). Further, it also violates the terms of Cleveland.com's comment User Agreement and Privacy Policy, which provides:

(2)(A) Absent explicit prior written consent in certain situations, you may not, nor may you allow, enable, authorize, instruct, encourage, assist, suggest, inform, or promote that others, directly or indirectly, do any of the following for any reason: * * *

* impersonate, imitate or pretend to be somebody else, by setting up different accounts/profiles or otherwise, or falsely state, represent, or imply any affiliation, association, or connection with a person or entity when using the Service;

* repeatedly post, upload, transmit, send or otherwise make available on or through the Service the same Content multiple times in a day, week, or month.¹

Mr. Uldricks is not now, nor was he ever, a public figure. Nor has he joined into any public debate that might give rise to a heightened malice requirement. Quite simply, he wants to do his job and be left alone. The defendants in this action have consistently and intentionally injected him into the public eye. And, while your client could have chosen any username to post his comments, he chose one easily identified with Mr. Uldricks.

But even setting aside potential claims against your client, Ohio law is well-established that absent some claim of privilege, only persons served with the subpoena have standing to challenge the subpoena under Civ. R. 45. See *Kinds v. United Healthcare Serv.*, C.P. No. 08-CVC-01-00889, 2010 Ohio Misc. LEXIS 21412, at *1-2 (Ohio Mar. 31, 2010); *Jones v. Records Deposition Services of Ohio, Inc.*, Lucas App. No. L-01-1333, 2002 Ohio App. LEXIS 2295. (May 10, 2002); *North Olmsted v. Pisani*, Cuyahoga App. No. 67986 and 67987, 1995 Ohio App. LEXIS 5204 (Nov. 22, 1995).

Federal courts sitting in Ohio have also affirmed that, unless a third-party can claim some personal right or privilege, he or she lacks standing to object, and those courts have even applied that principle to subpoenas seeking the IP addresses of anonymous internet users. See *Riding Films, Inc. v. Doe*, 2013 U.S. Dist. LEXIS 92049, (S.D. Ohio, July 1, 2013) (citing *Novovic v. Greyhound Lines, Inc.*, 2:09-CV-00753, 2012 U.S. Dist. LEXIS 9203, at *23 (S.D. Ohio Jan. 26, 2012)) (quoting *Donahoo v. Ohio Dep't of Youth Servs.*). Here, it is unclear what personal right or privilege your client has to use a username associated with Mr. Uldricks in order to place him, unwillingly, in the public eye.

Moreover, your client waived whatever rights to privacy and anonymity he held when he agreed to Advance Ohio Media's User Agreement and Privacy Policy. In order to gain access to the service, your client agreed that Advance "may also provide access to our database in order

¹ <https://www.advance.net/advancedigitalUserAgreementPP/>

Mr. Matthew W. Nakon, Esq.
August 17, 2016
Page 3 of 3

to cooperate with official investigations or legal proceedings initiated by governmental and/or law enforcement officials, as well as private parties, including, for example, in response to subpoenas, search warrants, court orders, or other legal process.”² Again, courts have held internet users have “no reasonable expectation of privacy” when they have already shared that information with an internet service provider. *See Riding Films, Inc.*, supra.

Finally, your client’s use of the name “Rick Citizen” is consistent with the pattern of harassment and defamation that Defendant O’Bryan has engaged in and tends to show that your client is either Mr. O’Bryan or someone who is working in concert with him. In either case, Mr. Uldricks’ interest in clearing his name, preventing further misattribution to him, determining whether Mr. O’Bryan is conspiring with others, and discovering how far Mr. O’Bryan has spread his misinformation outweighs any minimal interest that your client has in maintaining his anonymity.

Ultimately, I have no interest in litigating the case in this letter, and if there is a way to resolve this dispute without filing motions, I’m open to discussing it. For example, if your client is willing to provide information subject to a protective order, as others have, we may be able to come to some agreement. If not, I anticipate that the court will, like me, respect your client’s right to comment anonymously but will be curious regarding his or her motivation in choosing “Rick Citizen” as a username.

Please feel free to contact me if you wish to discuss this matter further. I look forward to hearing from you.

Very truly yours,

WEGMAN, HESSLER & VANDERBURG

A handwritten signature in black ink, appearing to read "Rachel E. Lyons", with a long horizontal flourish extending to the right.

Rachel E. Lyons

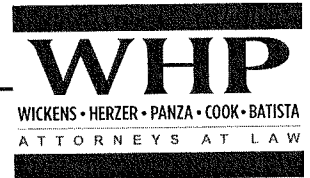
REL/rcm

cc: Ms. Jennifer Ruggieri

² <https://www.advance.net/advancedigitalUserAgreementPP/>

Matthew W. Nakon

Attorney at Law



35765 Chester Road

Avon, OH 44011-1262

Direct: (440) 695-8051

Email: MNakon@WickensLaw.com

Main: (440) 695-8000

Fax: (440) 695-8098

Web: www.WickensLaw.com

August 23, 2016

VIA EMAIL ONLY (relyons@wegmanlaw.com)

Rachel E. Lyons, Esq.
Wegman, Hessler & Vanderburg
A Legal Professional Association
6055 Rockside Woods Boulevard, Suite 200
Cleveland, OH 44131-2302

RE: Advance Ohio Media, LLC (Cleveland.com) Subpoena
Richard Uldricks vs. Jim O'Bryan, et al.; Cuyahoga County Court of Common Pleas;
Case No. CV-16-864148

Dear Ms. Lyons:

Thank you for your letter of August 17, 2016 and on behalf of "rickcitizen" I hereby respond to the same. I have no desire to engage in a letter writing campaign with you, but want to take one last effort at convincing you to withdraw your Advance Ohio Media subpoena, at least to the extent you seek the personal information of my client, "rickcitizen."

I am glad you recognize that both the Ohio Constitution and the First Amendment guarantee free anonymous speech. I agree that the right of anonymity can be trumped, where libelous or threatening statements are made -- but only where specific statements are identified and deemed to be actionable. As concerns "rickcitizen," we will not agree that your client has any meritorious claims concerning his blog posts or that you have outlined even a rudimentary basis for a false light claim against "rickcitizen." Despite writing me a three page letter, you fail to identify a single statement attributable to "rickcitizen" which you claim to be actionable, whether as being defamatory, placing your client in a false light or as part of a conspiracy. Simply stated, you must identify an actionable statement capable of surviving a Civil Rule 12(B)(6) motion before my client's anonymity will be lost.

I have carefully reviewed your Complaint and its attachments several times. While I believe there is much about Mr. Uldricks which you either choose to ignore or are unaware, you admit enough to establish that Mr. Uldricks is not simply a benign building inspector, who avoided Lakewood politics or the media storm surrounding important public issues in that community. Rather, you admit that Mr. Uldricks was employed by a media company and managed a blog for that company called "Lakewood Citizen." I

also understand Mr. Uldricks to have been a public employee, hired by Lakewood's current mayor and to have personally participated in the Build Lakewood campaign as a supporter, blog commentator and advocate. Contrary to your claims, Mr. Uldrick's is certainly a limited purpose public figure and likely will be found to be a public official under the standard set forth in *Rosenblatt v. Baer*, 383 U.S. 75 (1966). Simply stated, it does not appear that you will have much success in painting your client to be a wallflower, when his role in Lakewood government and his vocal participation in the political arena will certainly come out in discovery.

You or your client also appear to be operating under some grand misconceptions. My client has never denied using the pseudonym "rickcitizen" on Cleveland.com. After my client first used the pseudonym, a second blogger began using the name "rick citizen" apparently for the purpose of chastising my client for using the pseudonym. Given your client's current stance that my client intended to impersonate him, common sense suggests that the second blogger was your client, Mr. Uldricks. The posts that draw this issue to the forefront are:

rickcitizen: Lakewood City Government ... No Truth ... No Transparency ...
No Worries. Keep On Rockin', Mayor Summers.

rick citizen: Shoot I already said this. Please delete this comment.

rickcitizen: @rickcitizen More dirty tricks by camp Build Lakewood and the
Summers' camp.

rick citizen: @rickcitizen dirty tricks? *You mean like picking your name
Rick?* More dirty tricks by SLH [Save Lakewood Hospital] and
the Kucinich camp.

rickcitizen: I did not post the last two posts attributed to rickcitizen if someone
is moderating this site you need to look into this. There is some
sort of breach.

See, Exhibit A, Article and Comments [emphasis added].

Given your client's current allegations of impersonation, we find it doubtful that two Lakewood bloggers would care enough to challenge my client's pseudonym and presume Mr. Uldrick's is "rickcitizen." Ironically, my client's Cleveland.com posts do not even reference Mr. Uldricks, and they certainly do not bear any resemblance to your client's apparent political views.

Contrary to your suggestion, my client is not Jim O'Bryan; is not the person you appear to believe to be John Doe; and is not the person you appear to believe is Jane Doe. If you review my client's posts you will also find that he would not want his identity confused with Mr. Uldricks. Although you seem to think otherwise, Mr. Uldricks played absolutely no role in my client's decision to use the pseudonym "rickcitizen." Rather, my client's choice of the pseudonym is directly traceable to matters in his own life, which will be addressed if necessary for his defense. While your client may like to think he played a role, he simply was not a factor. My client knew very little about your client, was not interested in the same Lakewood political issues and had no reason or desire to impersonate him. By reviewing his posts, you

will see your client is not a subject of which "rickcitizen" had much interest and the posts contain nothing defamatory or which place Mr. Uldricks in a false light. In light of the facts, I find it problematic and disturbing that an attorney would write an unprotected letter concluding that my client has violated R.C. § 2917.21 (telecommunications harassment). My client has done no such thing and I would think you would be more careful before making such accusations.

Importantly, you seem to admit that "rickcitizen" has not defamed your client. I say this because you point to no statement of his that you contend to be defamatory. Rather, you suggest (incorrectly) that my client made posts under the name "rickcitizen," wanting others to believe that he was your client. Please identify any statement of "rickcitizen" you believe to place your client in a "false light" or which supports a conspiracy. As I am sure you know, only with the Ohio Supreme Court's recent decision in *Welling vs. Weinfeld*, 113 Ohio St.3d (2007) did Ohio recognize false light invasion of privacy as a claim. However, the Court was also very limiting as to the factual scenarios that might give rise to a false light invasion of privacy. Even were Mr. Uldricks' theory that my client wanted others to believe "rickcitizen" was Rick Uldricks, what is it about "rickcitizen's" posts that you claim offends the sensibilities of the average reader to cast your client in a false light?

Instead of searching every crevice for something from which you might fashion a claim, I think it is time for your client to admit that "rickcitizen" is someone other than he believed them to be. Although my client's politics differ from Mr. Uldricks', there is nothing actionable about his posts. My client does not desire to be involved in protracted litigation. However, he will not surrender his anonymity unless and until Mr. Uldricks produces something to suggest that he has done something actionable, even though he will be faced with the expense of protecting his constitutional rights. Provide me a legitimate basis for your client's claims against "rickcitizen" and we will consider your evidence. Until then, we intend to vigorously protect our client's rights. Given its history of protecting First Amendment rights, we expect Advance Ohio Media to do the same. Feel free to contact me if you wish to discuss this matter further. I look forward to hearing from you.

Very truly yours,

WICKENS, HERZER, PANZA, COOK & BATISTA CO.

By: Matthew W. Nakon
Attorney at Law

MWN/nrs

cc: Ms. Jennifer Ruggieri, Advance Media LLC (via email)



12650 DETROIT AVENUE • 44107 • 216/529-6613 • FAX 216/529-5669
Website: www.onelakewood.com

Jean M. Yousefi, SPHR
Director of Human Resources

Notice of Pre-Disciplinary Meeting

February 11, 2016

Mr. Richard Uldricks
(By hand delivery)

Dear Mr. Uldricks:

This notice is provided to advise you that a pre-disciplinary meeting will be held at 3:00 p.m. on Friday, February 12, 2016 in the Mayor's Conference Room at City Hall to provide you with an opportunity to respond to the following allegations:

- 1) **Falsification of your employment application. You failed to include all criminal convictions on your application and on the Applicant's Record Check form.**

The application you signed on February 17, 2015 states "I hereby certify that all information supplied herein is true, accurate and complete to the best of my knowledge. I understand and agree that any false statements, misrepresentations or omissions of fact contained in this application (or any accompanying or required documents) may cause the rejection of this application or termination of employment without notice or benefits, regardless of how or when discovered."

The Applicant's Record Check form you signed on April 22, 2015 states: "I fully understand that my failure to fully respond either yes or no to the above questions, or withhold any information regarding any conviction, or provide the requested information may result in my application being removed from consideration or may be cause for discharge from service after hire."

Human Resources Policy 7.02: Guidelines for Disciplinary Action and Penalties states under "Examples of Offenses A. Dismissal – 1st Offense":

The offenses listed under this heading are considered serious enough to warrant dismissal despite the fact that the employee committing the offense has not received previous discipline of any kind. This list is representative of types of

EXHIBIT B

behavior the City considers serious enough to warrant immediate dismissal, and is not intended to be all-inclusive.

7. Misrepresentation, making false statements, or dishonesty of any kind, including but not limited to falsification of employment or related records.”

Human Resources Policy 3.05 Evaluation of Applicants states in part:

Otherwise qualified applicants may be eliminated from consideration for a position if the applicant:

1. makes a false statement of material fact on the employment application or other hiring documents;
 2. has committed or attempted to commit a fraudulent act at any stage of the selection process;
- E. If an applicant is hired and it is subsequently discovered that one (1) of the above disqualifying criteria apply, the employee may be disciplined or discharged as provided in this manual regardless of when the disqualifying criteria is discovered.

Your initial denial of any criminal history and later failure to disclose your entire criminal history are evidence of dishonesty and misrepresentation of your background prior to hire. Beyond the three convictions you disclosed on your Applicant's Record Check form you have also had convictions on other charges.

- 2) **Poor conduct toward residents. You sent anonymous postcards to two residents which were meant to be intimidating in nature.**

Human Resources Policy 1.03 Ethics of Public Employment states: “All employees shall maintain the highest ethical and moral standards and perform their duties within the parameters of the laws of the State of Ohio and other ordinances rules and regulations that may be set forth by the City. Employees should remember that their compensation is paid through taxes and user fees. Therefore, each employee assumes the responsibility to serve the public in an honest, effective and professional manner. Discourtesy or rudeness to the public will not be tolerated.”

Human Resources Policy 7.02: Guidelines for Disciplinary Action and Penalties states in part under “Examples of Offenses A. Dismissal – 1st Offense”:

19. Violations of ethical provisions and policies, including, specifically, violations of federal, state and local law.

Human Resources Policy 6.05: Employee Conduct Policy states in part:

- C. Courtesy is the key to good employee conduct. Courtesy means being helpful to the public and fellow employees. It means being tactful in dealings with the public and other employees.
- D. Integrity and initiative are also obvious signs of a good employee, as are attitude and appearance, which do more than reflect pride in your work and the City. They affect the opinions of those around you.
- E. The City of Lakewood requires all employees to conduct work activities in an honest, courteous and professional manner at all times."

Because of your position your conduct toward residents is of particular importance. Three official complaints have been made against you by residents. Additionally, you have admitted to police to sending the postcards.

3) Misuse of city computers. You utilized the city computer for personal reasons to conduct administrative functions on your personal website.

Human Resources Policy 6.09: Use of City Property states in part:

- A. City property and facilities are to be used exclusively for work related City business. Such property shall include, but not necessarily be limited to, copy machines, office supplies, tools, equipment and City vehicles.

Human Resources Policy 6.10 Computer, Internet and Electronic Mail states in part:

V. General Standards of Conduct for Internet Use:

- A. Employees should treat the Internet as a formal communications tool similar to the telephone, radio, video and written communications. All employees are responsible for their own actions and communications on the Internet.
- B. Employees are permitted to access the Internet for personal use only during non-working time and in full compliance with all terms of this and all other policies.
- C. Prohibited use of the City computers and/or electronic services:
 - 1. for political, commercial or for-profit purposes;
 - 7. to harass other users or to transmit materials likely to be offensive or objectionable.

February 11, 2016

Page 4

- F. Any employee who violates this policy or uses electronic services for improper purposes shall be subject to discipline, up to and including discharge and may face criminal and/or civil charges.

You have had multiple conversations even prior to being hired, with multiple managers about your use of city computers for personal or outside business and yet you persist in utilizing the computer for the Lakewood Citizen.

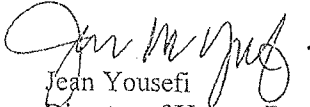
You have the right to appear at the meeting to present your oral or written statements in response to these charges. Any statements you make or response during this conference must be truthful. Untruthful statements may subject you to discipline.

The pre-disciplinary meeting will be conducted by Jean Yousefi, Director of Human Resources and Kevin Butler, Director of Law and Mayor Michael Summers.

If you have any questions in regard to this procedure, please contact Jean Yousefi at extension 6613 immediately.

You were informed of this hearing via letter on Thursday, February 11, 2016.

Sincerely,


Jean Yousefi
Director of Human Resources

cc: Mike Molinski, City Architect
Dru Siley, Director
Mike Summers, Mayor
Kevin Butler, Law Director
Eugene Byrne, Chairperson
Mary Simon, Steward

Received: _____
Richard Uldricks

February 12, 2016

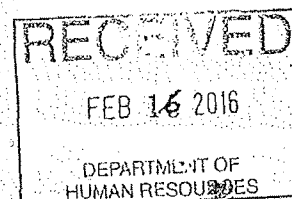
To Whom It May Concern --

Please accept this letter of resignation from my employment with the city of Lakewood effective Tuesday, February 16, 2016.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Richard Uldricks', with a long horizontal flourish extending to the right.

Richard Uldricks



July 19, 2016

Via Certified Mail Delivery,
Return Receipt Requested

Advance Ohio Media, LLC (Records Custodian)
c/o CSC-Lawyers Incorporating Service (Corporation Service Company)
50 W. Broad Street, Suite 1800
Columbus, Ohio 43215

Re: *Richard Uldricks v. Jim O'Bryan, et.al.*
Cuyahoga County Court of Common Pleas, Case No.: CV-16-864148

Dear Sir or Madam:

This law firm represents Richard Uldricks in connection with the above litigation. Enclosed is a Civil Rule 45 Subpoena being issued to Advance Ohio Media, LLC in connection with comments posted on cleveland.com by the usernames and/or accountholders identified in Exhibit A attached to the Subpoena. If you have any questions regarding the same or if this Subpoena should be directed to a different Advance entity, please contact me at the number listed above.

Thank you for your attention to this matter.

Very truly yours,

WEGMAN, HESSLER & VANDERBURG



Rachel E. Lyons

REL/dlp
Enclosure

ENCLOSURE

EXHIBIT C

IN THE COURT OF COMMON PLEAS

SUBPOENA CIVIL RULE 45

THE STATE OF OHIO

ss.

Cuyahoga County

Richard Uldricks

Plaintiff

No. CV-16-864148

vs.

Jim O'Bryan, et al.

Defendant

Judge MICHAEL P. DONNELLY

To Advance Ohio Media, LLC (Records Custodian)
c/o CSC-Lawyers Incorporating Service (Corporation Service Company)
50 W. Broad Street, Suite 1800
Columbus, Ohio 43215

☐ YOU ARE COMMANDED to appear in the Court of Common Pleas to testify as witness on behalf of the (PLAINTIFF/DEFENDANT) in the above entitled case and not depart the Court without leave. Fail not under penalty of the law. Your appearance is required on the _____ of _____ at _____ o'clock _____ M. in

Courtroom No. _____ of the:

Justice Center-Court Tower
1200 Ontario Street
Cleveland, Ohio 44113 ☐

Courthouse Square
310 W. Lakeside Ave.
Cleveland, OH 44113 ☐

Cuyahoga County Courthouse
One Lakeside Avenue
Cleveland, Ohio 44113 ☐

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of deposition in the above case.

PLACE OF DEPOSITION _____ DATE _____ TIME _____

☒ YOU ARE COMMANDED to produce and permit inspection, copying, testing or sampling of the following documents or objects at the place, date, and time specified below (list documents or objects):
See Exhibit A, attached. In lieu of appearance, the requested documents may be mailed by the designated date. Contact the undersigned at (216) 642-3342 with any questions.

6055 Rockside Woods Blvd, Ste 200, Cleveland, OH 44131
PLACE

08/02/2016 10:00 a.m.
DATE TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES _____ DATE _____ TIME _____

To insure taxation of their fees, witnesses must report each attendance to the Clerk of Court of Common Pleas on the first floor of the Justice Center-Courts Tower.

Section 2335.06 of the Ohio Revised Code provides that witnesses are entitled to receive \$12.00 for each full day's attendance and \$6.00 for each half day's attendance, plus ten cents per mile traveled to and from his place of residence outside of the City of Cleveland proper. Such fees are taxed as costs and mailed to the witness upon payment of the costs.

Rachel E. Lyons

ATTORNEY NAME

6055 Rockside Woods Blvd. Ste 200. Cleveland, OH 44131

ADDRESS

SIGNATURE

(0090741)

Plaintiff

REPRESENTING

07/19/2016

DATE

Cuyahoga County, Clerk of Courts

by

Richard X Bryan

Clerk

THE STATE OF OHIO

ss.

Cuyahoga County

Affidavit of Service of Subpoena by Sheriff or Officer, Attorney or Private Person

On the _____ day of _____, 20____
 I served this Subpoena on the within named:

as follows:

SHERIFF'S FEES

Service on _____ \$ _____
 _____ Copy _____
 _____ Miles Travel _____
 _____ Return _____
 _____ \$ _____

Witness entitled to _____ miles

By _____ Deputy Sheriff/Attorney

Subscribed and sworn to before me, a

This _____ day of _____, 20____

RULE 45. RULES OF CIVIL PROCEDURE, PARTS C & D

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A PARTY OR AN ATTORNEY RESPONSIBLE FOR THE ISSUANCE AND SERVICE OF A SUBPOENA SHALL TAKE REASONABLE STEPS TO AVOID IMPOSING UNDUE BURDEN OR EXPENSE ON A PERSON SUBJECT TO THAT SUBPOENA.

(2)(A) A PERSON COMMANDED TO PRODUCE UNDER DIVISIONS (A)(1)(B)(iii), (iv), (v), OR (v) OF THIS RULE NEED NOT APPEAR IN PERSON AT THE PLACE OF PRODUCTION OR INSPECTION UNLESS COMMANDED TO ATTEND AND GIVE TESTIMONY AT A DEPOSITION, HEARING, OR TRIAL.

(B) SUBJECT TO DIVISION (D)(2) OF THIS RULE, A PERSON COMMANDED TO PRODUCE UNDER DIVISIONS (A)(1)(B)(iii), (iv), (v), OR (v) OF THIS RULE MAY, WITHIN FOURTEEN DAYS AFTER SERVICE OF THE SUBPOENA OR BEFORE THE TIME SPECIFIED FOR COMPLIANCE IF SUCH TIME IS LESS THAN FOURTEEN DAYS AFTER SERVICE, SERVE UPON THE PARTY OR ATTORNEY DESIGNATED IN THE SUBPOENA WRITTEN OBJECTIONS TO PRODUCTION, IF OBJECTION IS MADE, THE PARTY SERVING THE SUBPOENA SHALL NOT BE ENTITLED TO PRODUCTION EXCEPT PURSUANT TO AN ORDER OF THE COURT BY WHICH THE SUBPOENA WAS ISSUED. IF OBJECTION HAS BEEN MADE, THE PARTY SERVING THE SUBPOENA, UPON NOTICE TO THE PERSON COMMANDED TO PRODUCE, MAY MOVE AT ANY TIME FOR AN ORDER TO COMPEL THE PRODUCTION. AN ORDER TO COMPEL PRODUCTION SHALL PROTECT ANY PERSON WHO IS NOT A PARTY OR AN OFFICER OF A PARTY FROM SIGNIFICANT EXPENSE RESULTING FROM THE PRODUCTION COMMANDED.

(3) ON TIMELY MOTION, THE COURT FROM WHICH THE SUBPOENA WAS ISSUED SHALL QUASH OR MODIFY THE SUBPOENA, OR ORDER APPEARANCE OR PRODUCTION ONLY UNDER SPECIFIED CONDITIONS, IF THE SUBPOENA DOES ANY OF THE FOLLOWING:

(A) FAILS TO ALLOW REASONABLE TIME TO COMPLY;

(B) REQUIRES DISCLOSURE OF PRIVILEGED OR OTHERWISE PROTECTED MATTER AND NO EXCEPTION OR WAIVER APPLIES;

(C) REQUIRES DISCLOSURE OF A FACT KNOWN OR OPINION HELD BY AN EXPERT NOT RETAINED OR SPECIALLY EMPLOYED BY ANY PARTY IN ANTICIPATION OF LITIGATION OR PREPARATION FOR TRIAL, AS DESCRIBED BY CIV. R. 26(B)(4), IF THE FACT OR OPINION DOES NOT DESCRIBE SPECIFIC EVENTS OR OCCURRENCES IN DISPUTE AND RESULTS FROM STUDY BY THAT EXPERT THAT WAS NOT MADE AT THE REQUEST OF ANY PARTY;

(D) SUBJECTS A PERSON TO UNDUE BURDEN.

(4) BEFORE FILING A MOTION PURSUANT TO DIVISION (C)(3)(D) OF THIS RULE, A PERSON RESISTING DISCOVERY UNDER THIS RULE SHALL ATTEMPT TO RESOLVE ANY CLAIM OF UNDUE BURDEN THROUGH DISCUSSIONS WITH THE ISSUING ATTORNEY. A MOTION FILED PURSUANT TO DIVISION (C)(3)(D) OF THIS RULE SHALL BE SUPPORTED BY AN AFFIDAVIT OF THE SUBPOENAED PERSON OR A CERTIFICATE OF THAT PERSON'S ATTORNEY OF THE EFFORTS MADE TO RESOLVE ANY CLAIM OF UNDUE BURDEN.

(5) IF A MOTION IS MADE UNDER DIVISION (C)(3)(C) OR (C)(3)(D) OF THIS RULE, THE COURT SHALL QUASH OR MODIFY THE SUBPOENA UNLESS THE PARTY IN WHOSE BEHALF THE SUBPOENA IS ISSUED SHOWS A SUBSTANTIAL NEED FOR THE TESTIMONY OR MATERIAL THAT CANNOT BE OTHERWISE MET WITHOUT UNDUE HARDSHIP AND ASSURES THAT THE PERSON TO WHOM THE SUBPOENA IS ADDRESSED WILL BE REASONABLY COMPENSATED.

(D) DUTIES IN RESPONDING TO SUBPOENA.

(1) A PERSON RESPONDING TO A SUBPOENA TO PRODUCE DOCUMENTS SHALL, AT THE PERSON'S OPTION, PRODUCE THEM AS THEY ARE KEPT IN THE USUAL COURSE OF BUSINESS OR ORGANIZED AND LABELED TO CORRESPOND WITH THE CATEGORIES IN THE SUBPOENA. A PERSON PRODUCING DOCUMENTS OR ELECTRONICALLY STORED INFORMATION PURSUANT TO A SUBPOENA FOR THEM SHALL PERMIT THEIR INSPECTION AND COPYING BY ALL PARTIES PRESENT AT THE TIME AND PLACE SET IN THE SUBPOENA FOR INSPECTION AND COPYING.

(2) IF A REQUEST DOES NOT SPECIFY THE FORM OR FORMS FOR PRODUCING ELECTRONICALLY STORED INFORMATION, A PERSON RESPONDING TO A SUBPOENA MAY PRODUCE THE INFORMATION IN A FORM OR FORMS IN WHICH THE INFORMATION IS ORDINARILY MAINTAINED IF THAT FORM IS REASONABLY USEABLE, OR IN ANY FORM THAT IS REASONABLY USEABLE. UNLESS ORDERED BY THE COURT OR AGREED TO BY THE PERSON SUBPOENAED, A PERSON RESPONDING TO A SUBPOENA NEED NOT PRODUCE THE SAME ELECTRONICALLY STORED INFORMATION IN MORE THAN ONE FORM.

(3) A PERSON NEED NOT PROVIDE DISCOVERY OF ELECTRONICALLY STORED INFORMATION WHEN THE PRODUCTION IMPOSES UNDUE BURDEN OR EXPENSE. ON MOTION TO COMPEL DISCOVERY OR FOR A PROTECTIVE ORDER, THE PERSON FROM WHOM ELECTRONICALLY STORED INFORMATION IS SOUGHT MUST SHOW THAT THE INFORMATION IS NOT REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR EXPENSE. IF A SHOWING OF UNDUE BURDEN OR EXPENSE IS MADE, THE COURT MAY NONETHELESS ORDER PRODUCTION OF ELECTRONICALLY STORED INFORMATION IF THE REQUESTING PARTY SHOWS GOOD CAUSE. THE COURT SHALL CONSIDER THE FACTORS IN CIV. R. 26(B)(4) WHEN DETERMINING IF GOOD CAUSE EXISTS. IN ORDERING PRODUCTION OF ELECTRONICALLY STORED INFORMATION, THE COURT MAY SPECIFY THE FORMAT, EXTENT, TIMING, ALLOCATION OF EXPENSES AND OTHER CONDITIONS FOR THE DISCOVERY OF THE ELECTRONICALLY STORED INFORMATION.

(4) WHEN INFORMATION SUBJECT TO A SUBPOENA IS WITHHELD ON A CLAIM THAT IT IS PRIVILEGED OR SUBJECT TO PROTECTION AS TRIAL PREPARATION MATERIALS, THE CLAIM SHALL BE MADE EXPRESSLY AND SHALL BE SUPPORTED BY A DESCRIPTION OF THE NATURE OF THE DOCUMENTS, COMMUNICATIONS, OR THINGS NOT PRODUCED THAT IS SUFFICIENT TO ENABLE THE DEMANDING PARTY TO CONTEST THE CLAIM.

(5) IF INFORMATION IS PRODUCED IN RESPONSE TO A SUBPOENA THAT IS SUBJECT TO A CLAIM OF PRIVILEGE OR OF PROTECTION AS TRIAL-Preparation Material, THE PERSON MAKING THE CLAIM MAY NOTIFY ANY PARTY THAT RECEIVED THE INFORMATION OF THE CLAIM AND THE BASIS FOR IT AFTER BEING NOTIFIED. A RECEIVING PARTY MUST PROMPTLY RETURN, SEQUESTER, OR DESTROY THE SPECIFIED INFORMATION AND ANY COPIES WITHIN THE PARTY'S POSSESSION, CUSTODY OR CONTROL. A PARTY MAY NOT USE OR DISCLOSE THE INFORMATION UNTIL THE CLAIM IS RESOLVED. A RECEIVING PARTY MAY PROMPTLY PRESENT THE INFORMATION TO THE COURT UNDER SEAL FOR A DETERMINATION OF THE CLAIM OF PRIVILEGE OR OF PROTECTION AS TRIAL-Preparation Material. IF THE RECEIVING PARTY DISCLOSED THE INFORMATION BEFORE BEING NOTIFIED, IT MUST TAKE REASONABLE STEPS TO RETRIEVE IT. THE PERSON WHO PRODUCED THE INFORMATION MUST PRESERVE THE INFORMATION UNTIL THE CLAIM IS RESOLVED.

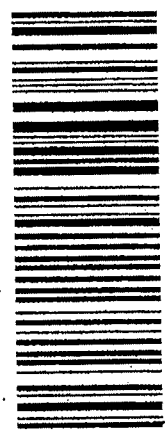
EXHIBIT A

1. Any and all information, whether in printed or electronic format, indicating the names, identities and IP addresses, associated with the following usernames, or close variations thereof, used on cleveland.com:
 - a. "Get a life"
 - b. "icu4whatur"
 - c. "rick citizen"
 - d. "Wake Up Lakewood!"
2. Any and all usernames used by, registered to, or associated with Richard Uldricks or Rick Uldricks between January, 2015 and the present.
3. Any and all usernames used by, registered to, or associated with Jim O'Bryan or James O'Bryan.

Wegman
Hessler  Vanderburg

6055 Rockside Woods Boulevard, Suite 200
Cleveland, OH 44131

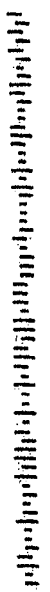
CERTIFIED MAIL



7000 0600 0022 6923 9262



Advance Ohio Media, LLC (Records Custodian)
c/o CSC-Lawyers Incorporating Service
(Corporation Service Company)
50 W. Broad Street, Suite 1800
Columbus, Ohio 43215

4321535910 0004 

Case Law

KeyCite Yellow Flag - Negative Treatment
Distinguished by McDade v. Morris, Ohio App. 9 Dist.,
November 12, 2015

2009 WL 3043386

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.

Tiffany CHIASSON, Plaintiff-Appellee

v.

DOPPCO DEVELOPMENT, LLC,
et al., Defendants-Appellants.

No. 93112.

|
Decided Sept. 24, 2009.

Synopsis

Background: Employee brought employment discrimination action against employer. The Court of Common Pleas, Cuyahoga County, No. CV-631149, denied employer's motion to quash or modify subpoena, and employer appealed.

Holding: The Court of Appeals, Colleen Conway Cooney, J., held that trial court's failure to conduct evidentiary hearing or in camera review of alleged privileged materials constituted an abuse of discretion requiring reversal or order and remand.

Reversed and remanded.

West Headnotes (1)

[1] **Appeal and Error**

⚡ Depositions, Affidavits, or Discovery

Witnesses

⚡ Subpoena Duces Tecum

Trial court's failure to conduct an evidentiary hearing or in camera review

to determine whether any of requested materials were protected under work-product doctrine before denying employer's motion to quash or modify discovery subpoena, in employee's employment discrimination action, constituted an abuse of discretion requiring reversal of order and remand.

Cases that cite this headnote

Civil Appeal from the Cuyahoga County, Court of Common Pleas, Case No. CV-631149.

Attorneys and Law Firms

David A. Posner, James A. Slater, Jr. Baker & Hostetler LLP, Cleveland, OH, for appellants.

Brian D. Spitz, The Spitz Law Firm, LLC, Cleveland, OH, for appellee.

Opinion

COLLEEN CONWAY COONEY, A.J.

*1 N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendants-appellants, Doppco Development, LLC, Jeffrey Doppelt, and Alan Berger (collectively referred to as "appellants") appeal the trial court's denial of their motion to quash or modify a subpoena. Finding merit to the appeal, we reverse and remand.

{¶ 3} In July 2007, plaintiff-appellee, Tiffany Chiasson ("Chiasson"), filed suit against Joseph Panetta

("Panetta"), Integrity Staffing Services ("ISS"), and the appellants alleging employment discrimination.¹

{¶ 4} Chiasson sought employment through ISS, an employment staffing company. ISS placed her with Doppco Development, LLC ("Doppco") as a project coordinator in April 2007, and she was directly supervised by Panetta.² Chiasson alleged that Panetta made several unwanted advances and inappropriate comments to her. She further alleged that as a result of her reporting Panetta's sexual harassment, the appellants retaliated against her by excluding her from company functions and denying her benefits provided to other employees.

{¶ 5} As part of her written discovery request to the appellants, Chiasson sought all documents and electronically stored information that related to her. In November 2007, Chiasson moved to compel appellants to respond to her discovery requests. The trial court granted Chiasson's motion to compel in part and denied it in part on February 1, 2008.

{¶ 6} Chiasson alleges that appellants produced a limited number of documents after she demonstrated that appellants withheld at least 65 pages of documents. In April 2008, she moved for sanctions and to enforce the court's February 1, 2008 order. She claims that after appellants were confronted with the missing documents and her motion for sanctions, they informed the court that some of the documents may have been destroyed at the recommendation of Kevin Blinkhorn ("Blinkhorn"), Doppco's outside IT administrator.³

{¶ 7} Chiasson served Blinkhorn with a subpoena in December 2008, asking him to produce, among other things, information regarding the destruction of electronic information, protocols for backup tape storage, and his communications with the appellants.

{¶ 8} In response to this subpoena, appellants moved to quash or modify the subpoena, arguing that the documents Chiasson sought are protected by the attorney work-product doctrine and were prepared in anticipation of litigation. Appellants provided the privilege log to the court in support of their motion. Chiasson opposed the motion to quash, and the trial court denied appellants' motion in March 2009.

*2 {¶ 9} It is from this order that the appellants appeal, raising one assignment of error in which they argue that the trial court erred in denying their motion to quash or modify the Blinkhorn subpoena.⁴ The appellants claim that the documents at issue were created by their attorney, Brokaw, and for him by Blinkhorn and in connection with Brokaw's investigation of the lawsuit.

{¶ 10} This court reviews a trial court's ruling on a motion to quash a subpoena for an abuse of discretion. *State ex rel. The v. Cos. v. Marshall*, 81 Ohio St.3d 467, 1998-Ohio-329, 692 N.E.2d 198. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 11} In the instant case, Chiasson served a subpoena on Blinkhorn in late December 2008 requesting the following materials from Doppco:

"1. All documents and/or electronic files, including but not limited to, all communications, cell-phone records, phone records, bids, contracts for services, promotional documentation, request to perform work, written protocols and directives, outlines of scope of projects, outlines of requirements, contracts for payment, reports, promotional materials, outlines of qualifications, invoices, emails, letters, and payments by, to from, and/or between, or relating to, Doppco Development, LLC (and/or any of its employees, principals or agents) from January 1, 2006 to the present.

* * *

"9. All documents and/or electronic files, including but not limited to, all bills, invoices, financial records, payroll records, and checks by, to, from, or relating to Doppco Development, LLC (and/or any of its employees) from January 1, 2006 to the present.

"10. All electronic files, including but not limited to, computer back-up files, computer back-up tapes, computer back-up discs/CD-ROMS/ or other tangible computer media types, by, to, from, or relating to, Doppco Development, LLC (and/or any of its employees) from January 1, 2006 to the present."

{¶ 12} In January 2009, the appellants moved to quash or modify the subpoena served on Blinkhorn, arguing that the material requested is protected by the attorney work-product doctrine and that the documents were prepared in anticipation of litigation. Chiasson argued in her opposition brief that the communications with Blinkhorn are not privileged and that Doppco does not have standing to challenge the Blinkhorn subpoena. The trial court denied the appellants' motion to quash in March 2009, without issuing an opinion or stating any reasons.

{¶ 13} However, because the trial court summarily denied the appellants' motion, without conducting an evidentiary hearing or undertaking an in camera inspection, we find that the record is insufficiently developed to determine whether the documents requested in the subpoena violate the work-product doctrine.

*3 {¶ 14} As the court in *Grace v. Mastruserio*, Hamilton App. No. C-060732, 2007-Ohio-3942, stated: “[s]ome documents will undoubtedly be privileged or will be protected by the work-product doctrine, and conversely some will not. To distinguish between protected and unprotected materials, the trial court should have, at a minimum, conducted an evidentiary hearing or undertaken an in camera review of the case file.”

{¶ 15} Moreover, this court has found that upon assertion of work-product privilege, the trial court *shall* conduct an in camera review to determine whether such privilege applies. See *Jerome v. A-Best Prod. Co.*, Cuyahoga App. Nos. 79139-79142, 2002-Ohio-1824, ¶ 31, citing *Stelma v. Juguilon* (1992), 73 Ohio App.3d 377, 389, 597 N.E.2d 523. Furthermore, this court has found that the trial court commits reversible error when it fails to hold an evidentiary hearing or in camera review to analyze the requested material alleged to be work-product privileged. See *Squire Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, Cuyahoga App. No. 92366, 2009-Ohio-2490, ¶ 91.

{¶ 16} Thus, we conclude that the trial court abused its discretion by denying the appellants' motion to quash or modify the Blinkhorn subpoena without holding an evidentiary hearing or conducting an in camera review. We therefore reverse the order denying the appellants' motion and remand the matter with instructions for the trial court to conduct an evidentiary hearing or to undertake an in camera review of the subpoenaed materials, and to decide if any of the materials are protected under the work-product doctrine.

{¶ 17} Accordingly, the sole assignment of error is sustained.

{¶ 18} Judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is ordered that appellants recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR. and JAMES J. SWEENEY, JJ., concur.

All Citations

Slip Copy, 2009 WL 3043386, 2009 -Ohio- 5013

Footnotes

1 Panetta is not part of this appeal, and ISS was dismissed with prejudice in November 2007.

2 Panetta reported to Jeffrey Doppelt and Alan Berger.

3 In January 2008, the court held a pretrial conference in which the parties agreed to exchange privilege logs identifying each document claimed to be privileged, the date on which the document was prepared, the name of the person who prepared the document, the person to whom the document was directed, and the purpose for which the document was prepared. Appellants' privilege log, provided to Chiasson on February 1, 2008, indicated that Doppco's then in-house counsel, Kevin Brokaw ("Brokaw"), had communications with Blinkhorn.

Chiasson, however, failed to provide appellants with a privilege log by the February 1 deadline, which resulted in appellants filing a motion to compel. The trial court granted appellants' motion in November 2008.

- 4 We note that generally discovery orders are not appealable. *Walters v. Enrichment Center of Wishing Well, Inc.* (1997), 78 Ohio St.3d 118, 121, 676 N.E.2d 890. However, if the judgment orders a party to disclose allegedly privileged material, it is appealable pursuant to R.C. 2505.02(B)(4).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2011 WL 5904661

West Headnotes (3)

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Seneca County.

Kevin J. HOERIG, Plaintiff–Appellant,

v.

TIFFIN SCENIC STUDIOS, INC.,
et al., Defendants–Appellees.

No. 13–11–18.

|

Decided Nov. 28, 2011.

Synopsis

Background: Workers' compensation claimant sought benefits from employer for an alleged work-related shoulder injuries. Employer appealed from orders of the Industrial Commission granting claimant benefits for the injuries, which were refused. Employer appealed, and cases were consolidated. The Court of Common Pleas, Seneca County, Trial Court No. 10–CV–0248, entered judgment on jury verdict determining that claimant was not entitled to participate in the Workers' Compensation Fund. Claimant appealed.

Holdings: The Court of Appeals, Preston, J., held that:

[1] employer had standing to file motion to quash subpoena served on its employee by claimant, and

[2] trial court's errors in granting employer's motion to quash subpoena without requiring affidavit of efforts made to resolve undue burden or giving claimant opportunity to respond were not prejudicial, reversible errors.

Affirmed.

Shaw, J., concurred in judgment only.

[1] **Workers' Compensation**

✦ Discovery and Depositions

Employer had standing to file motion to quash subpoena served on its employee by workers' compensation claimant, who had suffered a work-related injury while working for employer and who sought benefits from employer, as corporation, was a “person” for purposes of rule setting forth specific instances when a party has suffered an injury sufficient for standing to file a motion to quash a subpoena, employer alleged that employee would be working out of state at time of trial, and that it would be required to pay over six thousand dollars in travel costs, overtime pay, and other expenses to return employee to the state for trial, and that this was an undue burden on employer, and information claimant sought to elicit from employee was obtained while employee was acting within course and scope of his employment. Rules Civ.Proc., Rule 45(C)(3).

Cases that cite this headnote

[2] **Workers' Compensation**

✦ Discovery and Depositions

Trial court was not justified in granting employer's motion to quash subpoena served on its employee by workers' compensation claimant, who had suffered a work-related injury while working for employer and who sought benefits from employer, without first requiring employer to file affidavit of efforts made to resolve alleged undue burden on it caused by the subpoena or to give claimant an opportunity to respond to the motion; rule required employer to attempt to resolve any claim of undue burden and provide court with an affidavit or certificate of the efforts made to resolve issue, but employer failed to make any effort to resolve the undue burden with claimant, and granting motion without affording claimant a chance

to respond deprived claimant of opportunity to demonstrate that he had a substantial need for employee's testimony that could not be met without undue hardship. Rules Civ.Proc., Rule 45.

Cases that cite this headnote

[3] **Workers' Compensation**

 Harmless Error

Trial court's errors in granting employer's motion to quash subpoena served on its employee by workers' compensation claimant, who had suffered a work-related injury while working for employer and who sought benefits from employer, without first requiring employer to file affidavit of efforts made to resolve alleged undue burden on it caused by the subpoena or to give claimant an opportunity to respond to the motion, were not prejudicial and reversible errors, as claimant could have called other witnesses besides employee to testify consistent with claimant's claim, but did not do so, and employer provided substantial evidence in opposition to the claim. Rules Civ.Proc., Rule 45.

Cases that cite this headnote

Appeal from Seneca County Common Pleas Court Trial Court No. 10-CV-0248.

Attorneys and Law Firms

Christopher S. Clark, for Appellant.

Barbara A. Knapic, Denise A. Gary, for Appellee, Tiffin Scenic Studios, Inc.

Carolyn S. Bowe, for Appellee, Industrial Commission of Ohio.

Opinion

PRESTON, J.

*1 ¶ 1 Plaintiff-appellant, Kevin Hoerig (hereinafter "Hoerig"), appeals the Seneca County Court of Common

Pleas' verdict determining that he is not entitled to participate in the Ohio Workers' Compensation Fund. For the reasons that follow, we affirm.

¶ 2 On February 9, 2009, Hoerig was hanging theater stage curtains as a Tiffin Scenic Studios, Inc. (hereinafter "Scenic") employee. (May 16, 2011 Tr. at 62). While hanging the curtains, Hoerig pulled a rope carrying draperies weighing approximately 140 pounds. (*Id.* at 68). Hoerig reached over his head to fasten the draperies. (*Id.* at 66). Hoerig alleges he injured his shoulder while reaching over his head to hang the stage curtains. (*Id.* at 69). Hoerig worked with Timothy Felter (hereinafter "Felter") for the two days following his alleged injury. (*Id.* at 74-78).

¶ 3 On February 20, 2009, Hoerig filed a claim with the Ohio Bureau of Workers' Compensation (hereinafter "BWC"), alleging he had sprained his right rotator cuff while working for Scenic. The BWC disallowed Hoerig's claim. (Doc. No. 5). Hoerig appealed the BWC's decision. (*Id.*).

¶ 4 On April 20, 2009, the District Hearing Officer with the Industrial Commission of Ohio (hereinafter "ICO") held a hearing on Hoerig's appeal. (*Id.*). The District Hearing Officer allowed Hoerig's claim for the condition of "right rotator cuff strain." (*Id.*). Scenic appealed the District Hearing Officer's decision. (Doc. No. 8).

¶ 5 On June 15, 2009, a Staff Hearing Officer with the ICO held a hearing on Scenic's appeal. (*Id.*). The Staff Hearing Officer affirmed the decision, allowing the claim for "right rotator cuff/shoulder strain." (*Id.*). Scenic filed a second appeal with the ICO on July 7, 2009. (Doc. No. 11). The ICO refused the appeal on July 15, 2009. (*Id.*).

¶ 6 On December 2, 2010, Scenic filed an appeal with the Seneca County Court of Common Pleas pursuant to R.C. 4123.512. (Doc. No. 2). The Seneca County Court of Common Pleas assigned the matter case number 10 CV 0607. (*Id.*).

¶ 7 On August 19, 2009, Hoerig filed a motion with the BWC requesting the additional condition of "tear right rotator cuff." (Doc. No. 4). The BWC amended Hoerig's claim to include "tear rotator cuff, right" on August 28, 2009. (*Id.*). Scenic filed an appeal of the amended claim on September 11, 2009. (*Id.*).

{¶ 8} On December 11, 2009, the District Hearing Officer with the ICO held a hearing on Hoerig's additional condition of "tear rotator cuff, right." (Doc. No. 5). The District Hearing Officer allowed the condition. (*Id.*). Scenic appealed the District Hearing Officer's decision. (Doc. No. 6).

{¶ 9} On February 3, 2010, the Staff Hearing Officer held a hearing and affirmed the District Hearing Officer's decision. (*Id.*). Scenic filed a second appeal on the additional condition. (Doc. No. 8). The ICO refused the appeal. (*Id.*).

*2 {¶ 10} On April 27, 2010, Scenic filed an appeal of the additional condition "tear rotator cuff, right" with the Seneca County Court of Common Pleas pursuant to R.C. 4123.512. (Doc. No. 2). The Seneca County Court of Common Pleas assigned the matter case number 10 CV 0248. (*Id.*).

{¶ 11} On June 16, 2010, Hoerig filed a motion with the BWC for the additional condition of "right bicipital tenosynovitis and right shoulder impingement." (Doc. No. 4). The BWC allowed the additional condition of "right bicipital tenosynovitis and right shoulder impingement" on June 29, 2010 (*Id.*). Scenic appealed the BWC's order on July 12, 2010. (*Id.*).

{¶ 12} On August 5, 2010, the District Hearing Officer held a hearing on the additional condition. (*Id.*). The District Hearing Officer allowed the additional condition of "right bicipital tenosynovitis and right shoulder impingement." (*Id.*). Scenic appealed the order on August 23, 2010. (Doc. No. 6).

{¶ 13} On September 22, 2010, the Staff Hearing Officer held a hearing on Scenic's appeal. (*Id.*). The Staff Hearing Officer affirmed the District Hearing Officer's order. (*Id.*). Scenic filed a second appeal of the order with the ICO on October 6, 2010. (Doc. No. 8). The ICO refused the appeal. (*Id.*).

{¶ 14} On November 4, 2010, Scenic filed an appeal of the order with the Seneca County Court of Common Pleas pursuant to R.C. 4123.512. (Doc. No. 2). The Seneca County Court of Common Pleas assigned the matter case number 10 CV 0562. (*Id.*). The trial court consolidated the

three cases under case number 10 CV 0248 on January 26, 2011. (Doc. No. 17).

{¶ 15} On May 5, 2011, Scenic filed Defendant's "Motion to Quash the Subpoena Served by Plaintiff on Tim Felter." (Doc. No. 39). The trial court granted Scenic's motion on May 6, 2011. (Doc. No. 43).

{¶ 16} On May 9, 2011, Hoerig filed a "Motion for Reconsideration of Court's Judgment Entry Granting Defendant's Motion to Quash Subpoena Served on Tim Felter with Memorandum in Support." (Doc. No. 46). The trial court denied the motion for reconsideration on that same day. (Doc. No. 53).

{¶ 17} The Seneca County Court of Common Pleas held a jury trial from May 16, 2011 through May 18, 2011. (Doc. No. 69). The jury determined that Hoerig was not entitled to participate in the Ohio Workers' Compensation Fund for the conditions of "right sprain rotator cuff, tear right rotator cuff, right bicipital tenosynovitis, and right shoulder impingement." (Doc. No. 65-70). The Seneca County Court of Common Pleas entered judgment in favor of Scenic. (Doc. No. 69).

{¶ 18} Hoerig filed a notice of appeal on June 6, 2011, raising two assignments of error. We will address each assignment of error in turn.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED DEFENDANT'S MOTION TO QUASH THE SUBPOENA SERVED UPON TIMOTHY FELTER AS DEFENDANT HAD NO STANDING PURSUANT TO CIV. R. 45.

*3 [1] {¶ 19} In his first assignment of error, Hoerig argues the trial court abused its discretion by granting Scenic's motion to quash the subpoena served on Felter. Hoerig argues Scenic did not have standing to file the motion to quash under rule 45 of the Ohio Rules of Civil Procedure. Hoerig relies on the language of the rule, which permits a court to quash a subpoena when it "[s]ubjects a person to undue burden." Civ.R. 45(C)(3). Hoerig argues Civ.R. 45 requires the subpoenaed person, in this case Felter, to show the undue burden. Hoerig claims Scenic did not have standing to quash the subpoena of Felter because Scenic was not the subpoenaed person.

{¶ 20} In reviewing whether a trial court erred in granting a motion to quash a subpoena, this Court applies an abuse of discretion standard. *State ex rel. The v. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. An abuse of discretion connotes more than an error of judgment; rather, it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 21} In order to have standing, a party must have an actual or imminent injury, there must be a causal connection between the injury and the conduct the party is addressing, and the court must be capable of redressing the injury with its decision. *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351. Civ.R. 45 provides specific instances when a party suffers an injury sufficient for standing to file a motion to quash a subpoena. These instances include when the subpoena does not provide a reasonable time period for the party to comply, when the subpoena requires the party to disclose privileged information, when the subpoena requires the party to disclose work product, or when the subpoena “subjects a person to an undue burden.” Civ.R. 45(3)(a)-(d).

{¶ 22} Courts have long considered a corporation a person for the purposes of the law. *Lewis D. Johnson v. Humphrey PopCorn Co.* (1902), 14 Ohio C.D. 135, 1902 WL 19738, *3. A corporation acts, in many respects, like a person. *Cook Cty., Ill., v. U.S. ex rel. Chandler* (2003), 538 U.S. 119, 125, 123 S.Ct. 1239, 155 L.Ed.2d 247. For example, a corporation may own property, enter into a contract, sue another party, and be sued. *Id.* As a corporation, Scenic is considered a person for the purposes of the law. Under a strict reading of Civ.R. 45, “a person” may make a motion to quash a subpoena when that person suffers an undue burden. The rule does not state the person suffering the undue burden must be the subpoenaed person as Hoerig argues. See *id.* Consequently, Scenic had standing to make a motion to quash the subpoena on Felter if the subpoena subjected Scenic to an undue burden.

{¶ 23} Courts have recognized an undue burden as one that is “ * * * excessive, immoderate, unwarranted.” *Bonewitz v. Chevrolet* (2001), 9th Dist. No. 01-CA-0006, at *2, citing *Insulation Unlimited, Inc. v. Two J's Properties, Ltd.* (1997), 95 Ohio Misc.2d 18, 28, 705 N.E.2d 754 (emphasis omitted). In its motion, Scenic included an

affidavit of Brad Hussler, Scenic's President. (Doc. No. 39). The affidavit verified that Felter would be working for Scenic in Charlotte, North Carolina at the time of the trial. *Id.* Returning Felter to Ohio for the trial would cost Scenic over six thousand dollars in travel costs, overtime pay, and other expenses. *Id.* We cannot find that the trial court abused its discretion in determining that Scenic is a “person” under Civ.R. 45 and that six thousand dollars was an undue burden.

*4 {¶ 24} This ruling is also consistent with prior case law where courts have permitted employers to file motions to quash subpoenas served on their employees. *In re Deposition of Turvey*, 3d Dist. No. 15-02-07, 2002-Ohio-6008 (hospital filed motion to quash subpoena served on its medical staff coordinator); *Chiasson v. Doppco Dev.*, 8th Dist. No. 93112, 2009-Ohio-5013 (employer filed motion to quash subpoena served on its outside IT administrator). This Court has stated that an employer has standing to maintain a motion to quash a subpoena served on an employee where the information sought was obtained while the employee was “acting within the course and scope of her employment.” *Turvey* at ¶ 13. Allegedly, Felter's testimony would have informed the jury of Hoerig's conduct while he was working with Felter on the days following his injury. Thus, the information Hoerig sought to elicit from Felter was obtained while Felter was acting within the course and scope of his employment with Scenic. Therefore, we cannot find that the trial court abused its discretion in finding Scenic had standing to file a motion to quash the subpoena served on Felter.

{¶ 25} Hoerig's first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. II

THE ACTION OF THE TRIAL COURT IN GRANTING DEFENDANT'S MOTION TO QUASH THE SUBPOENA SERVED UPON TIMOTHY FELTER CONSTITUTES PREJUDICIAL AND REVERSIBLE ERROR.

[2] {¶ 26} In his second assignment of error, Hoerig argues the trial court's action in granting Scenic's motion to quash the subpoena on Felter is prejudicial and reversible error because Hoerig could not meet his burden of proof without Felter's testimony. Hoerig alleges Felter

would have provided testimony corroborating Hoerig's claim that he was injured while working for Scenic. Hoerig argues his burden of proof was essentially insurmountable without Felter's testimony supporting Hoerig's claim.

{¶ 27} According to Civ.R. 45, a motion filed to quash a subpoena due to an undue burden "shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden." Additionally, the rule states that "the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship." Civ.R. 45. The rule further provides that the party will be "reasonably compensated" for the undue burden. Civ.R. 45.

{¶ 28} Hoerig correctly argues the trial court erred in granting Scenic's motion to quash the subpoena on Felter without including an affidavit of efforts made to resolve the undue burden or giving Hoerig an opportunity to respond. Civ.R. 45 requires that the attorney opposing the subpoena attempt to resolve any claim of undue burden and provide the court with an affidavit or certificate of the efforts made to resolve the issue. *Future Communications, Inc., v. Hightower*, 10th Dist. No. 01AP-1175, 2002-Ohio-2245, ¶ 17. Scenic failed to make any effort to resolve the undue burden with Hoerig, arguing such actions would have been "futile." Consequently, Scenic failed to include the required affidavit or certificate because Scenic had not made the required attempt.

*5 {¶ 29} The trial court also erred in granting Scenic's motion to quash the subpoena on Felter without giving Hoerig an opportunity to respond to Scenic's motion. Scenic filed its motion to quash on May 5, 2011. The trial court granted the motion on May 6, 2011. The immediate ruling on the motion did not provide Hoerig with an opportunity to respond and demonstrate he had a substantial need for the testimony that could not be met without undue hardship as required under Civ.R. 45.

[3] {¶ 30} However, we cannot find that the trial court's errors were prejudicial and reversible errors. A trial court has considerable discretion in discovery matters, as well as the admission or exclusion of evidence. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668, 591 N.E.2d 752, citing *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 63, 295 N.E.2d 659.

An *ex parte* ruling on a motion to quash a subpoena can be considered harmless error where the subpoena is unduly burdensome. *Eitel v. Eitel* (Aug. 23, 1996), 4th Dist. No. 95CA11, at *5 (court affirming the trial court's *ex parte* quashing of subpoenas, "finding they were unreasonable, oppressive, and unduly burdensome and would not lead to relevant testimony.")

{¶ 31} In the present case, we cannot find Hoerig would have been successful in opposing the motion to quash by demonstrating a substantial need for the testimony that could not otherwise be met without undue hardship, as required under Civ.R. 45. See, also, *Bonewitz* at * 1. Scenic demonstrated it would suffer an undue burden of six thousand dollars as a result of the subpoena on Felter. Civ.R. 45 states that when the subpoena subjects a person to an undue burden, the court "shall" grant the motion, unless the party issuing the subpoena demonstrates a substantial need and undue hardship. *Future Communications* at ¶ 18. See, also, *Eitel*, at *5. Hoerig argues he had a substantial need for the testimony because Felter would have corroborated his claim. Hoerig alleges Felter would have testified that he had complained his shoulder hurt while working with Felter in the days following the alleged injury, and that this testimony was essential for Hoerig to meet his burden of proof. However, Scenic accurately points out that Felter's alleged testimony is speculative because Hoerig never deposed Felter and relies solely on an unsworn written statement.

{¶ 32} Even if Hoerig had a substantial need for this testimony, the facts could have been otherwise presented without undue hardship. Hoerig's witness list included Terry Irwin (hereinafter "Irwin"), who was working with Hoerig on the day of his alleged injury. (Doc. No. 23). Hoerig could have called Irwin, had he been properly served, to testify that he hurt his shoulder. (Doc. No. 16). Like Felter, Irwin had given an unsworn written statement consistent with Hoerig's claim. (*Id.*). In addition to Irwin, Hoerig could have called his mother, Margaret Hoerig-Jennings. (Doc. No. 23). According to the trial court's record, Hoerig's mother could have testified that Hoerig did not injure his shoulder while working in her house as Scenic alleged, but that Hoerig had previously injured his shoulder while working for Scenic. (Doc. No. 16). Hoerig did not call either of these witnesses at trial, instead relying on the testimony of Hoerig and his fiancé, who would benefit from Hoerig's compensation for his injury. (May 16, 2011 Tr. at 48-158). Hoerig provides little

explanation for why he chose not to call these witnesses and fails to explain how calling these witnesses instead of Felter would have caused him undue hardship. Thus, Felter was one part of the cumulative evidence Hoerig could have presented. Hoerig failed to present all of the potential evidence at his disposal to meet his burden of proof. Hoerig also failed to request to continue the trial until a time when Felter and/or Irwin would be available. Consequently, this Court cannot find that the trial court's decision to grant the motion to quash the subpoena on Felter was prejudicial and reversible error.

*6 {¶ 33} Furthermore, Scenic provided substantial evidence in opposition to Hoerig's claim. Scenic offered testimony from Randy Groves and Scott Swander, with whom Hoerig had also worked in the days following his alleged injury. (May 17, 2011 Tr. at 252–59). Both men testified that Hoerig did not mention his allegedly injured shoulder, and Hoerig was observed raising his allegedly hurt arm to cut a hole in the ceiling. (*Id.*). During his testimony, Hoerig admitted doing work in his mother's home after he allegedly injured his shoulder. (May 16, 2011 Tr. at 90–94). This work included installing a countertop, sink, mirror, light, backsplash, and tile. (*Id.* at 134–43, 295 N.E.2d 659). Scenic also offered testimony that Scenic terminated Hoerig's employment after Scenic discovered Hoerig was

collecting unemployment compensation while working for them. (May 17, 2011 Tr. at 197). Finally, Scenic provided evidence that Hoerig only reported his alleged injury after Scenic terminated his employment. (*Id.* at 189–92, 295 N.E.2d 659). In light of the alternative available evidence, the trial court's broad discretion, and the substantial evidence contrary to Hoerig's claim, we cannot find that the trial court's granting of Scenic's motion to quash the subpoena on Felter was prejudicial and reversible error.

{¶ 34} Hoerig's second assignment of error is, therefore, overruled.

{¶ 35} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J., concurs.

SHAW, J., concurs in Judgment Only.

All Citations

Slip Copy, 2011 WL 5904661, 2011 -Ohio- 6103

2002 WL 31455155

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Third District, Van Wert County.

In re Matter of DEPOSITION OF Deborah TURVEY.
Munir M. UWAYDAH, M.D., Appellant.

No. 15-02-07.

|
Decided Nov. 5, 2002.

Appeal was taken from judgment and order of Court of Common Pleas, Van Wert County, quashing subpoena duces tecum issued in connection with defamation action pending in another state. The Court of Appeals, Bryant, J., held that: (1) pursuant to Uniform Foreign Depositions Act, trial court affirmatively exercised its authority to issue Ohio subpoena and, thereafter, lawfully quashed subpoena; (2) any error in allowing hospital to join employee in motion to quash subpoena duces tecum was not reversible error; (3) hospital had proper standing to maintain a motion to quash subpoena duces tecum; and (4) quashing subpoena did not violate full faith and credit clause.

Affirmed.

West Headnotes (4)

[1] **Pretrial Procedure**

↪ Subpoena duces tecum; production of documents or tangible things

Pretrial Procedure

↪ Motions for protective orders and proceedings thereon

Pursuant to Uniform Foreign Depositions Act, trial court affirmatively exercised its authority to issue an Ohio subpoena for deposition in California defamation action and, thereafter, lawfully quashed the Ohio subpoena. R.C. 2319.09; Rules Civ.Proc., Rule 45(C)(3).

2 Cases that cite this headnote

[2] **Appeal and Error**

↪ Discovery and depositions

Any error in allowing hospital to join its employee in motion to quash subpoena duces tecum in foreign defamation action was not reversible error, where employee had a right to maintain a motion to quash a subpoena issued to her. Rules Civ.Proc., Rule 45(C).

3 Cases that cite this headnote

[3] **Pretrial Procedure**

↪ Motions for protective orders and proceedings thereon

Hospital had proper standing to maintain a motion to quash subpoena duces tecum requiring hospital employee to appear with any records, notes, or documents relevant to her discussions with defendants in California defamation action; conversations between witness and defendants took place while witness was acting in course and scope of her employment with hospital, and plaintiff failed to establish existence of alleged champerty agreement between hospital and witness or to identify conflict of interest with respect to opposing counsel's dual representation of hospital and witness.

1 Cases that cite this headnote

[4] **Pretrial Procedure**

↪ Motions for protective orders and proceedings thereon

Quashing Ohio subpoena did not interfere with court reporter's authority to depose witness for purposes of California defamation action, so as to violate the full faith and credit clause; California commission, empowering court reporter to administer oath to witness and to reduce to writing her sworn deposition testimony for use as evidence in California action, was not a subpoena, and there was no evidence that witness was ever under

subpoena by California court. U.S.C.A. Const. Art. 4, § 1.

2 Cases that cite this headnote

Civil Appeal from Common Pleas Court.

Attorneys and Law Firms

Michael P. Harvey, Attorney at Law, Rocky River, OH, for appellant.

Michael W. Regnier, Attorney at Law, Toledo, OH, for appellees.

Opinion

BRYANT, J.

*1 {¶ 1} This appeal is brought by Munir M. Uwaydah, M.D. from the May 21, 2002 judgment and order of the Van Wert County Court of Common Pleas, quashing a subpoena duces tecum issued to Deborah Turvey.

{¶ 2} The record presents the following facts. Appellant Dr. Munir Uwaydah is the plaintiff in a lawsuit pending before the Superior Court of California, County of Santa Clara,¹ in which he is suing two California physicians for defamation. Appellee Deborah Turvey is the Medical Staff Coordinator for the Co-Appellee Van Wert County Hospital (Hospital), of which Appellant Dr. Uwaydah is a former employee.

{¶ 3} On March 21, 2002, Appellant filed, with the Van Wert County Court of Common Pleas, a "Commission" issued by the Superior Court of California, County of Santa Clara, declaring Deborah Turvey to be a material witness in the action pending in that court. The commission empowered Lisa Westrick, presumably a court reporter, but otherwise unidentified in the record, to administer an oath to Turvey and to reduce to writing Turvey's sworn deposition testimony for use as evidence in the California action. Upon Appellant's request and based on the California commissioning order, the trial court issued an "Order That Commission Issue For the Taking of The Deposition of Debra Turvey Outside the State of California." On March 26, 2001, the Van Wert County Clerk of Courts issued a subpoena duces tecum to

Debra Turvey, ordering her to appear as a witness for a deposition to be conducted at a Van Wert, Ohio law office.

{¶ 4} On April 4, 2002, Turvey and the Hospital filed a joint Motion to Quash the Subpoena, alleging that the information sought by Appellant was obtained or generated during the course of Turvey's duties as the coordinator of the Hospital's physician credentialing process and therefore was undiscoverable pursuant to R.C. 2305.25. Appellant opposed the motion and submitted to the trial court the affidavit of Appellant's California attorney, Michael G. Ackerman. According to Ackerman, Deborah Turvey informed him of a conversation she had with the California defendants in which alleged defamatory statements were issued regarding the Appellant. Ackerman stated that without Turvey's testimony, he could not prove defamation in the California suit.

{¶ 5} On May 21, 2002, the trial court held that the information sought by Appellant was undiscoverable pursuant to Ohio law, and subsequently quashed Turvey's subpoena. It is from this order that Appellant now appeals.

{¶ 6} Appellant raises four assignments of error attacking the propriety of the trial court's order to quash. Appellant argues that the trial court lacked jurisdiction to quash the subpoena, that the Appellees did not have standing to request that the subpoena be quashed, that the trial court improperly relied on a ruling out of the United States District Court for the Northern District of Ohio, Western Division, and that the trial court failed to give full faith and credit to the California order. For the reasons set forth below, we reject each of these arguments and affirm the trial court's decision.

Assignment of Error I

*2 {¶ 7} "The Van Wert Common Pleas Court erred by asserting jurisdiction to quash a California subpoena."

[1] {¶ 8} Appellant's first assignment of error argues that an Ohio court does not have jurisdiction to quash a subpoena issued by a California Court. Appellant relies on R.C. 2319.09, the Ohio version of Uniform Foreign Depositions Act, which gives Ohio courts the authority to compel a witness to appear and testify at a deposition

taken in Ohio for use in any case pending in a foreign state. *E.I. DuPont de Nemours & Co., Inc. v. Thompson* (1986), 29 Ohio App.3d 272, 504 N.E.2d 1195.

{¶ 9} While we generally agree with the Appellant's summation of the law as stated in R.C. 2319.09, we do not agree with Appellant's interpretation of the law's consequence in this matter. The Uniform Foreign Depositions Act is a statute of empowerment, not requirement. The statute gives courts the authority to issue subpoenas for foreign proceedings, but does not impose a requirement that courts issue a subpoena in every circumstance. Here, the trial court affirmatively exercised its authority to issue an Ohio subpoena to Deborah Turvey for deposition in the California action. Thereafter, the trial court lawfully quashed the Ohio subpoena pursuant to Civ.R. 45(C)(3) which provides that the court "from which the subpoena was issued" shall have authority to quash the subpoena.

{¶ 10} Thus, we find no violation of R.C. 2319.09 with respect to the Ohio subpoena. Furthermore, we find no evidence that the trial court asserted its jurisdiction over a California subpoena as there is no such document in the record. Accordingly, Appellant's first assignment of error is overruled.

Assignment of Error II

{¶ 11} "The Van Wert Common Pleas Court erred by allowing non-party Van Wert County Hospital to Maintain a Motion to Quash on behalf of the subpoenaed target."

[2] {¶ 12} Appellant's second assignment of error alleges that the appellee Hospital did not have standing to file a Motion to Quash the subpoena issued for the appellee Turvey. Apparently, Appellant has chosen to disregard the fact that the Motion to Quash was filed on behalf of Turvey and the Hospital. Regardless of the Hospital's standing, Civ.R.45(C) grants Turvey the right to maintain a motion to quash a subpoena issued to her. Therefore, any error in allowing the Hospital to join Turvey in the motion would not amount to reversible error.

[3] {¶ 13} Moreover, we find that the hospital did have proper standing to maintain a motion to quash. The trial court served Turvey with a subpoena duces

tecum requiring her to appear with any records, notes or documents relevant to her discussions with the California defendants. Turvey's conversations with the California defendants took place while she was acting in the course and scope of her employment with the Hospital. The Hospital, therefore, has a proprietary interest in the content of the conversations as well as the documents generated by the conversations and has a right to raise their confidentiality against a subpoena.

*3 {¶ 14} Appellant accuses Turvey and the Hospital of engaging in an illegal champerty agreement. Champerty, a species of maintenance, consists of an agreement under which a person who has no interest in the suit of another undertakes to maintain or support the suit at his own expense in exchange for part of proceeds in the litigated matter in the event of a successful outcome. *Finders Diversified, Inc. v. Baugh* (Apr. 20, 1984), Lucas App. No. L-83-424, quoting *Schnabel v. Taft Broadcasting Co., Inc.* (Mo.App.1975), 525 S.W.2d 819, 823.

{¶ 15} Appellant has failed to establish the existence of a champerty agreement. As established above, the Hospital is not a disinterested party in this matter but holds a proprietary interest in the information sought by Appellant. Furthermore, Appellant has failed to allege or show that the Hospital agreed to pay for Turvey's legal expenses for in exchange for proceeds in this matter. Thus, we find the champerty accusation to be groundless.

{¶ 16} Nor does Appellant cite law that would make it improper, on some other level, for the Hospital to provide Turvey legal representation. The Ohio Code of Professional Responsibility anticipates such situations by stating, "Since a lawyer must always be free to exercise his professional judgment without regard to the interest or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of this professional freedom." Ethical Consideration 5-24. Appellant fails to identify a conflict of interest with respect to opposing counsel's dual representation of Turvey and the Hospital. Accordingly, Appellant's second assignment of error is overruled.

Assignment of Error III

{¶ 17} “The Van Wert Common Pleas Court erred in relying upon the interlocutory order of a federal court as a basis for quashing the subpoena.”

{¶ 18} In his third assignment of error, Appellant asserts that the trial court's order to quash was the result of an improper application of res judicata based on a decision rendered in an action between the Appellant and Appellee in the United States District Court, Northern District of Ohio, Western Division. We disagree.

{¶ 19} The trial court's order to quash makes no mention of res judicata much less a federal decision. On the contrary, the order cites R.C. 2305.25 as the controlling authority. Rather than demonstrating the manner in which the trial court relied on the federal order, Appellant's argument responds to the Hospital's request for sanctions against Appellant. We have no information regarding this request nor do we find it to be relevant in the matter now before this court. Appellant has failed to demonstrate reversible error and therefore, his third assignment of error is overruled.

Assignment of Error IV

{¶ 20} The Van Wert Common Pleas Court erred by failing to give full faith and credit to a valid California Court discovery order.

*4 [4] {¶ 21} In his final assignment of error, Appellant argues that the trial court erred when it failed to give full faith and credit to a Commission issued to Lisa Westrick by the California Superior Court, Santa Clara County. Appellant argues that the Commission is a discovery order from a California court and as such an Ohio court must give it full faith and credit.

{¶ 22} Generally, the Full Faith and Credit Clause of the United States Constitution requires a state to respect the

“public acts, records and Judicial Proceedings of every other State.” *In re Keighley*, Union App. No. 14-99-33, 1999-Ohio-947, citing U.S. Const. Art. IV, Sec. 1. The commission in question, issued by the California Superior Court pursuant to Cal.Civ.Pro. § 2026(C), authorizes the commissioned party to conduct the deposition of Deborah Turvey in Ohio. The commission further empowers the commissioned party to “request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions.” Cal.Civ.Pro. § 2026(C).

{¶ 23} We find no evidence that the trial court disrespected or interfered with the commissioning order issued by the California Superior Court when it quashed the Ohio subpoena. Quashing the Ohio subpoena did not interfere with Lisa Westrick's authority to depose Turvey for purposes of the California action. Contrary to what Appellant argues, the California commission is not a subpoena. Furthermore, we find no evidence that Deborah Turvey was ever under subpoena by the California Superior Court. Therefore, the trial court did not violate the Full Faith and Credit Clause of the United States Constitution and Appellant's fourth assignment of error is overruled.

{¶ 24} For the reasons stated it is the order of this Court that the judgment of the Van Wert County Court of Common Pleas, is affirmed.

Judgment affirmed.

HADLEY and WALTERS, JJ., concur.

All Citations

Not Reported in N.E.2d, 2002 WL 31455155, 2002 -Ohio- 6008

Footnotes

1 *Munir Uwaydah, M.D. v. James F. Zuckerman, M.D. et al*, Case No. CV795916

2014 WL 667788

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.

Shonita BLACK, Plaintiff,

v.

Shelia KYLE-RENO, et al., Defendants.

No. 1:12-cv-503.

|

Feb. 20, 2014.

Attorneys and Law Firms

Shonita M. Black, Cincinnati, OH, pro se.

Kathleen H. Bailey, Hamilton County Prosecutor's Office,
Pamela J. Sears, Cincinnati, OH, for Defendants.

ORDER

KAREN L. LITKOVITZ, United States Magistrate
Judge.

*1 This matter is before the Court on plaintiff's Motion to Quash Subpoena to Produce Educational Records (Doc. 37) and supporting memorandum (Doc. 40), and defendant's memorandum in opposition (Doc. 39).

I. Background

Plaintiff brings this action alleging violations of her federal rights and state law claims arising out of the April 2011 termination of her employment as a Guardian ad Litem with the Office of the Hamilton County, Ohio Public Defender. (Doc. 2). On February 4, 2014, defendants issued subpoenas duces tecum pursuant to Fed.R.Civ.P. 45 to non-parties The Ohio State University and Thurgood Marshall School of Law. (Doc. 39, Exhs.1, 2). Defendants seek the following documents:

Educational records including but not limited to records relied upon by the university in its admission of Shonita Black such as an ACT or SAT score and/or high school transcripts, records of courses or

classes taken by Shonita Black at the university including the grades in any such courses or classes Shonita Black earned and any other document(s) retained by the university which constitutes an educational record.

(*Id.*).

Plaintiff seeks to quash the subpoenas pursuant to Fed.R.Civ.P. 45, arguing that the materials sought by defendants are overbroad and defendants are merely engaged in a "fishing expedition"; the records are irrelevant to her claims because her educational records were not part of the selection process for her job position; the subpoenas request privileged information which plaintiff has not consented to disclose; and the subpoenas do not comply with Rule 45 because plaintiff did not receive proper notice under the Rule.¹ (Doc. 37 at 1).

Defendants contend that plaintiff's lack of consent is not a bar to obtaining the requested documents because the Court can order production of the educational records pursuant to 34 C.F.R. § 99.31(a)(9)(i), which allows an educational institution to disclose "personally identifiable information from an education record of a student" without the student's prior consent in order to comply with a court order or lawfully issued subpoena. Defendants argue that plaintiff's educational records are relevant because plaintiff was terminated for cause, specifically failure to perform her job and incompetence, and her educational records arguably bear on her competence "generally and in the field of law." (Doc. 39 at 4). Defendants further allege that plaintiff's academic records "may lead to discoverable evidence indicative of Plaintiff's competence, intelligence or some other personal characteristic which may lead to discoverable information in this lawsuit." (*Id.*).

II. Motion to quash

Fed.R.Civ.P. 45(d) governs motions to quash subpoenas.² The Rule requires that on timely motion, the Court must quash subpoenas requiring "disclosure of privileged or other protected matter, if no exception or waiver applies[.]" Fed.R.Civ.P. 45(d)(3)(A)(iii). Rule 45(d)(3)(A)(iii) is properly applied here because

defendants seek disclosure of “protected matter,” *i.e.*, educational records in which plaintiff has a right of privacy. Plaintiff as the movant bears the burden of persuasion on her motion to quash the subpoenas. *See Hen dricks*, 275 F.R.D. at 253. *See also Recycled Paper Greetings, Inc. v. Davis*, No. 1:08-mc-13, 2008 WL 440458, at *3 (N.D. Ohio Feb. 13, 2008).

*2 Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena. Fed.R.Civ.P. 45(d)(3). However, courts have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26. *Hen dricks*, 275 F.R.D. at 253 (quoting *Barrington v. Mortgage IT, Inc.*, No. 07-61304, 2007 WL 4370647, at *3 (S.D. Fla. Dec. 10, 2007)).

Discovery under the federal rules is generally broad and liberal:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence....

Fed.R.Civ.P. 26(b)(1). Thus, the Court must determine whether the subpoena requests are overly broad or seek irrelevant information under the same standards set forth in Rule 26(b) and Fed.R.Civ.P. 34, which governs requests for production. *Hen dricks*, 275 F.R.D. at 253 (citing *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D. Kan. 2003)).

Courts have imposed a “significantly heavier burden” on a party requesting the discovery of educational records to show its interests in obtaining the records outweighs “the significant privacy interest of the students.” *Alig-Mielcarek*, 286 F.R.D. at 526. Thus, courts have ordered disclosure of educational records when the records are clearly relevant to the claims at issue. *Id.* (citing *Ragusa v. Malverne Union Free School Dist.*, 549 F.Supp.2d 288, 293–94 (E.D.N.Y. 2008) (ordering disclosure where records were deemed relevant as to whether the school's reasons for denying tenure to the plaintiff teacher

were a pretext for age, national origin, and disability discrimination); *Nastasia v. New Fairfield Sch. Dist.*, No. 3:04 CV 925(TPS), 2006 WL 1699599, *1–2 (D. Conn. June 19, 2006) (compelling disclosure of records of complaints similar to those made by the plaintiff where the information was “clearly relevant” to plaintiff's claims and the defendant's burden of production was “minimal”); *Davids v. Cedar Falls Cmty. Sch.*, No. C96 2071, 1998 WL 34112767, *3 (N.D. Iowa Oct. 28, 1998) (allowing disclosure of education records where the records were relevant to whether school “engaged in a practice of disparate discipline of minority and non-minority students”); *Rios v. Read*, 73 F.R.D. 589, 599 (E.D.N.Y. 1977) (students' academic records and test results were relevant where it would be “impossible to prove” the alleged Title VI violations without such records)).

III. The motion to quash is granted

Initially, the Court finds it need not determine whether defendants failed to comply with Rule 45(a)(4)'s notice provision by failing to serve a copy of the subpoenas on plaintiff before serving the subpoenas on the non-party schools. Plaintiff concedes she received notice of the subpoenas by mail on February 7, 2014 (Doc. 40 at 5), which allowed her the opportunity to move to quash the subpoenas. Plaintiff therefore has not been prejudiced by any technical violation of Rule 45, and the Court may address the merits of plaintiff's motion. *See Hen dricks*, 275 F.R.D. at 252 (citing *McClendon v. TelOhio Credit Union, Inc.*, 2006 WL 2380601, at *3 (S.D. Ohio Aug. 14, 2006) (court was entitled to look beyond an alleged technical violation of Rule 45's notice provision and address the merits of the issue of whether the subpoenaed information was properly discoverable where plaintiffs were not prejudiced by the violation.)).

*3 The Court finds that plaintiff has carried her burden to show that the motion to quash the subpoenas issued to the two educational institutions must be granted. Plaintiff's undergraduate and law school records are simply not relevant to the determination of whether plaintiff was a competent employee and whether she was terminated from her job as an Attorney Guardian ad Litem for failure to perform her job. This is not an employment discrimination case alleging a failure to hire where academic records might be relevant. Nor do defendants allege that plaintiff misrepresented her qualifications at the time of hiring, in which case her

academic records could likewise be relevant. To the contrary, defendants make no specific allegations to show that plaintiff's educational records may be relevant to this lawsuit. Defendants attempt to draw a possible link between plaintiff's academic performance and her job performance, but plaintiff's level of academic success has no bearing on how well she performed her job for defendants. Moreover, plaintiff's educational records are not likely to lead to the discovery of relevant information pertaining to her job performance and competency. Finally, the Court agrees with plaintiff that defendants' requests for all educational records related to plaintiff that these institutions have in their possession are overbroad. *See, e.g., Hen dricks*, 275 F.R.D. at 256 (finding subpoenas to former colleges and universities requesting documents pertaining to "[a]ny and all educational records, including but not limited to: transcripts, teacher

evaluations, standardized test results, disciplinary records, absenteeism/tardiness records" should be quashed on both relevancy and overbreadth grounds). For these reasons, the Court determines that defendants are not entitled to plaintiff's educational records sought in the subpoenas.

Accordingly, plaintiff's motion to quash the subpoenas duces tecum seeking her educational records is **GRANTED**.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 667788

Footnotes

- 1 Although plaintiff is a nonparty to the subpoenas, she has standing to challenge the disclosure of information as to which she possesses a claim of privilege or personal right. *See Hen dricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 n. 1 (S.D.Ohio 2011). Plaintiff possesses a right of privacy in her educational records under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. *See Owasso Indep., Sch. Dist. No. I-611 v. Falvo*, 534 U.S. 426, 428, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002); *Alig-Mielcarek v. Jackson*, 286 F.R.D. 521, 526 (N.D.Ga.2012).
- 2 Rule 45 was amended in 2013. Fed.R.Civ.P. 45(d) contains the provisions formerly contained in subdivision (c).

2012 WL 893880

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.

Robert W. VALENTINE, Plaintiff,

v.

REMKE MARKETS INCORPORATED, Defendant.

No. 1:10-CV-922.

March 15, 2012.

Attorneys and Law Firms

Stephen E. Imm, Katz Greenberger & Norton, Cincinnati,
OH, for Plaintiff.

Chad Ellis Willits, Felix John Gora, Rendigs Fry Kiely &
Dennis LLP, Cincinnati, OH, for Defendant.

ORDER

KAREN L. LITKOVITZ, United States Magistrate
Judge.

*1 This matter is before the Court on plaintiff's motion to quash subpoena and/or for protective order (Doc. 17), defendant's memorandum in opposition (Doc. 21), and plaintiff's reply memorandum. (Doc. 22).

Plaintiff brings this employment discrimination action alleging that defendant Remke refused to hire him as a Staff Pharmacist in May 2010:(1) based on his age (76); (2) his race (African American); (3) in retaliation for previously filing a Charge of Discrimination against his former employer SuperValu (doing business as "Biggs"); and (4) in retaliation for his opposition to what he believed was unlawful discrimination by SuperValu. (Doc. 1). On January 12, 2012, defendant issued a subpoena duces tecum to SuperValu/Biggs seeking the following documents:

1. All of plaintiff's employment records with SuperValu/Biggs;
2. All of plaintiff's records pertaining to compensation and benefits at SuperValu/Biggs; and

3. All documents pertaining to the discrimination charge plaintiff filed against SuperValu/Biggs.

(Doc. 21, Exh. A to subpoena duces tecum).

Plaintiff seeks to quash the subpoena pursuant to Fed.R.Civ.P. 45, arguing that the materials sought by defendant Remke are irrelevant to his failure to hire claim.¹ Plaintiff asserts that defendant did not rely on the records it now seeks in making its decision not to hire plaintiff and therefore such records are irrelevant to the claims in this case. In the alternative, plaintiff seeks a protective order under Fed.R.Civ.P. 26, which permits the Court, for good cause, to issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. Plaintiff also contends the *merit s* of his prior charge of discrimination against his former employer have no relevance to the hiring decision in this case and it is the fact of the filing of the charge alone—not the merits thereof—that is the only relevant factor in whether defendant's refusal to hire plaintiff was retaliatory. Plaintiff further contends that permitting discovery of records involving the previous charge of discrimination could have a "chilling effect" on a plaintiff's decision to assert his or her legal rights. (Doc. 17 at 7, citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065–66 (9th Cir.2004)).

Defendant contends the subpoena seeks: (1) documents and information that are relevant to plaintiff's prior Discrimination Charge and opposition activity; and (2) employment records reflecting upon plaintiff's suitability for a position with Remke. Defendant asserts it is entitled to investigate and explore the circumstances surrounding the events upon which it allegedly retaliated against plaintiff in order to defend against plaintiff's claims in this case. Plaintiff's complaint asserts two separate retaliation claims: one based on a Charge of Discrimination filed against Biggs, his prior employer, and another independent claim based upon alleged and unspecified "opposition" to what plaintiff believed was unlawful discrimination by his prior employer. Because the complaint fails to specify the "opposition" activity that forms the basis of plaintiff's second claim of retaliation, defendant argues it is entitled to discovery to determine whether or not that "opposition" was to practices made unlawful by Title VII or the ADEA as required to support plaintiff's retaliation claim. (Doc. 21 at 5, citing *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir.2000)).

Defendant also contends that information regarding prior charges or their validity can be probative of a plaintiff's motivation and credibility in filing a subsequent charge against another employer, as well as a plaintiff's alleged emotional damages.

*2 Defendant also argues that while plaintiff's previous employment records were not relied upon in the hiring decision, they nonetheless are reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's complaint and his motion to quash assert that he was objectively qualified for the Staff Pharmacist position, and that his skills, experience, and professional contributions made him an excellent candidate for the job, implying that defendant's decision not to hire him must have been motivated by some unlawful basis. Defendant asserts that plaintiff could also use these details to argue pretext and suggest that defendant's proffered legitimate nondiscriminatory basis for its decision is unworthy of belief. Defendant contends that plaintiff's previous employment records regarding his prior performance, complaints, and possible discipline could also impact plaintiff's credibility. In addition, to the extent plaintiff's prior employment records may reflect behavior consistent with the observations and impression of plaintiff made by Remke Pharmacy Director Christie Reynolds during plaintiff's interview, they may demonstrate that she accurately evaluated plaintiff's suitability for the position and, as a result, impact her credibility as a witness. Defendant states that prior employment records may be relevant to other issues as well, including front pay and mitigation of damages.

Finally, defendant asserts that plaintiff presumably intends to use his prior employment records in support of his claims and therefore cannot block access to defendant's use of the same. Plaintiff identified a previous employment record, *i.e.*, his "2010 Performance Review" prepared by his then-supervisor at Biggs, Ms. Barnes, as a document he may use to support his claims in his initial Rule 26 Disclosures and in response to defendant's Requests for Production of Documents. Defendant states that plaintiff also deposed Ms. Barnes and will presumably use her Performance Review and favorable recommendation to Ms. Reynolds in support of his claims.

In reply, plaintiff asserts that the only protected activity in which he engaged was the filing of his Discrimination Charge. He asserts he has not alleged, nor will he allege,

that he engaged in any other protected activity at Biggs other than the filing of a Discrimination Charge. Plaintiff alleges that the protected activity of filing a Charge also constituted protected "opposition" activity, and that he made a separate retaliation claim based on protected "opposition" activity in the event the evidence were to show that defendant was not aware of his Discrimination Charge *per se*, but was aware that he had in some manner protested discrimination at Biggs. In either of these events, retaliation against plaintiff for having engaged in this activity would have been illegal and defendant does not need to issue a blanket subpoena to Biggs in order to discover the nature of plaintiff's "opposition" activity.

*3 With respect to the 2010 Performance Review, plaintiff asserts this was included in his initial Rule 26 disclosures for use during Ms. Barnes' deposition in the event she disavowed her previous recommendation of plaintiff for a position with defendant. Because Ms. Barnes at her deposition did not deny recommending plaintiff for employment with defendant, plaintiff "does not see the performance review he produced early on in the case as being of any relevance, at least not if the Court agrees that Defendant's subpoena for Plaintiff's prior employment records is seeking irrelevant information." (Doc. 22 at 5). Finally, plaintiff argues his prior employment records are irrelevant to any damages he may have sustained by not being hired by defendant who would have established the wage and benefits for a Staff Pharmacist position and not relied on what a previous employer paid to plaintiff.

As the party seeking to quash the subpoena, plaintiff bears the burden of showing the discovery sought is overly broad, unduly burdensome, or not relevant. *Hendricks*, 275 F.R.D. at 253. "Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena. Courts, however, have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." *Id.* (quoting *Barrington v. Mortgage IT, Inc.*, No. 07-61304, 2007 WL 4370647, at *3 (S.D.Fla. Dec.10, 2007)). Discovery under the federal rules is broad and liberal: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Fed.R.Civ.P. 26(b)(1). The Court must determine whether the subpoena requests are overly broad or seek irrelevant information under the same standards set forth in Rule 26(b) and as applied to Rule 34 requests for production. *Hendricks*, 275 F.R.D. at 253 (citing *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D.Kan.2003)).

In this case, the Court determines that defendant may discover information about Charges or complaints of discrimination filed by plaintiff as requested in the subpoena. Plaintiff has filed two claims for retaliation: one based on a Charge of Discrimination filed by plaintiff against his former employer, SuperValu/Biggs, and one claim based on opposition activity. Plaintiff states he asserted a separate retaliation claim based on protected "opposition" activity in the event the evidence were to show that defendant was not aware of his Discrimination Charge *per se*, but was aware that he had in some manner protested discrimination at Biggs.

As an initial matter, it seems anomalous to permit plaintiff to assert retaliation claims against defendant Remke that stem from a charge of discrimination brought against SuperValu/Biggs, his former employer, then bar discovery underlying that discrimination charge. Understandably, plaintiff theorizes that whether or not there was merit to the former charge of discrimination is not relevant; what is relevant is whether defendant knew of the charge or plaintiff's opposition to an alleged discriminatory action and relied on such knowledge in deciding not to hire plaintiff. Yet, where the prior Charge of Discrimination forms the predicate for plaintiff's retaliation claim, the information surrounding plaintiff's prior charge of discrimination may lead to the discovery of admissible evidence. See *E.E.O.C. v. Buffalo Broadcasting Co., Inc.*, 163 F.R.D. 178, 179 (W.D.N.Y.1995). See also *Graham v. Casey's General Stores*, 206 F.R.D. 251, 256 (S.D.Ind.2002) (complaints, grievances, lawsuits, or charges against former employers relevant to credibility); *Trovers v. Travenol Laboratories, Inc.*, 94 F.R.D. 92, 93 (N.D.Ill.1982) (discovery of prior employment discrimination charge brought against a previous employer permitted as information might lead to admissible evidence on intent and motive in filing present action); *Stokes v. Xerox Corp.*, No. 05-cv-71683, 2006 WL 6686584, at *4 (E.D.Mich. Oct.5, 2006) (same). Because defendant Remke was not a party to the Charge, Remke must look to other sources to obtain information about the circumstances surrounding the Charge. While

some information may be obtained from the Ohio Civil Rights Commission to the extent SuperValu/Biggs included information and documentation in response to the Charge, any other information may only be obtained from SuperValu/Biggs. Defendant is entitled to discover the circumstances under which it is alleged to have unlawfully retaliated against plaintiff-whether by having knowledge of the Discrimination Charge itself or knowledge of plaintiff's protestation of discrimination at SuperValu/Biggs. At this juncture, and given the liberal scope of discovery, it would be unfair to permit plaintiff to allege retaliation claims then block any discovery held by plaintiff's former employer that underlies such claims. Discovery of the circumstances surrounding plaintiff's Charge of Discrimination and the aftermath thereof are certainly relevant to whether defendant Remke relied upon this information or retaliated against plaintiff in its decision not to hire him.² Plaintiff's motion is **DENIED** as to the information sought on plaintiff's retaliation claims.

*4 Defendant is also entitled to plaintiff's employment records relating to his job duties, discipline, performance reviews, complaints, and attendance. While plaintiff is correct that such records were not in possession of defendant at the time of its hiring decision and would not shed light on why defendant chose not to hire plaintiff, they may lead to the discovery of admissible evidence in this case. Plaintiff has presented himself as being objectively qualified for the position for which he was not hired by his skills, experience, and professional contributions. Plaintiff made his qualifications and past performance an issue when he identified his 2010 Performance Review from Super Valu/Biggs as a relevant document in his Rule 26 disclosures. Plaintiff recognized that a witness who works for defendant Remke might be disinclined to be forthcoming about plaintiff's performance and qualifications and therefore armed himself with his Performance Review for purposes of impeachment. Defendant is entitled to the same when it comes to assessing plaintiff's credibility and objective qualifications for the job. While plaintiff now says he will not be using any of his prior employment records in support of his claims, they are nonetheless relevant and/or may lead to the discovery of admissible evidence.

However, to the extent the subpoena seeks "any and all" employment records "without limitation," the request is overbroad. See, e.g., *E.E.O.C. v. Holmes & Holmes Indus., Inc.*, No. 2:10-cv-955, 2011 WL 5118306, at *2

(D.Utah Oct.27, 2011) (blanket request for all documents regarding party's employment is overly broad); *Richmond v. UPS Service Parts Logistics*, No. IPO1-1412, 2002 WL 745588, at *4 (S.D.Ind. April 25, 2002) (request to obtain employee's entire personnel file, on its face, is overbroad). The Court will issue a protective order narrowing the scope of the subpoena and limit it to the production of only those documents from SuperValu/Biggs that concern plaintiff's job duties, discipline, performance reviews, complaints, and attendance. Therefore, plaintiff's motion to quash the discovery of employment records is **DENIED**, but plaintiff's motion for protective order is **GRANTED** in accordance with the limitations set forth in this Order.

Defendant is not entitled to employment records reflecting plaintiff's compensation and benefits provided by SuperValu/Biggs during plaintiff's employment. Such records are simply not relevant to determining plaintiff's damages in this case. Plaintiff is correct that defendant Remke would set the compensation and benefits for a newly hired employee and whatever the person previously earned at his or her former employment is not relevant. Plaintiff's motion to quash the subpoena in this regard is **GRANTED**.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 893880

Footnotes

- 1 Plaintiff, a nonparty to the subpoena, has standing to challenge the subpoena seeking his employment records as he possesses a personal right to the information contained in such employment records. See *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 n. 1 (S.D.Ohio 2011).
- 2 The Court is not persuaded that discovery of this information will "chill" the exercise of protected rights under employment discrimination laws. *Rivera*, 364 F.3d at 1065-66, cited by plaintiff, addressed the release of information related to the plaintiffs' immigration status and the effect that would have on an employee's willingness to challenge unlawful employment actions. Plaintiff has not cited, and the Court has not found, cases applying *Rivera* outside of the immigration context holding that the disclosure of information related to prior charges of discrimination would chill the exercise of protected activity.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Malibu Media, LLC v. Doe, N.D. Ohio,
March 23, 2015

2013 WL 3322221

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.

RIDING FILMS, INC., Plaintiff,

v.

JOHN DOES 129-193, Defendants.

Civil Action No. 2:13-cv-46.

|
July 1, 2013.

Attorneys and Law Firms

David John Butler, Taft Stettinius & Hollister LLP,
Columbus, OH, Leon David Bass, Columbus, OH, for
Plaintiff.

Michael J. O'Reilly, Pickerington, OH, for Defendants.

OPINION AND ORDER

NORAH McCANN KING, United States Magistrate
Judge.

*1 This is a copyright action in which plaintiff alleges that defendants copied and distributed plaintiff's copyrighted work, the motion picture "Dawn Rider." *Complaint*, Doc. No. 1, ¶ 5. Defendants are otherwise identified only by IP addresses. *Exhibit B*, attached to *Complaint*. This matter is now before the Court on defendant Doe No. 163's *Motion to Quash Subpoena and Motion for Severance*, Doc. No. 5, and defendant Doe No. 189's *Motion to Quash Subpoena and Motion for Severance*, Doc. No. 6. For the reasons that follow, the motions are **DENIED**.

I. ALLEGATIONS, CLAIMS AND PROCEDURAL BACKGROUND

Plaintiff Riding Films, Inc., a limited liability company, is a developer, producer and/or distributor of motion pictures that has exclusive ownership rights over a

motion picture entitled "Dawn Rider." *Complaint*, ¶¶ 3, 5, 8, 9. Plaintiff alleges that unknown defendant Does 129-193 (collectively, "Doe defendants" or "unknown defendants") copied and distributed plaintiff's copyrighted work, Dawn Rider. *Id.* at ¶ 5. According to plaintiff, Doe defendants used a peer-to-peer ("P2P") network known as "BitTorrent protocol" or "torrent." *Id.* Plaintiff alleges that individuals, such as the unknown defendants, joined together as a "swarm" in order to use the BitTorrent protocol to illegally download copyrighted material:

The BitTorrent protocol makes even small computers with low bandwidth capable of participating in large data transfers across a P2P network. The initial file-provider intentionally elects to share a file with a torrent network. This initial file is called a seed. Other users ("peers") connect to the network and connect to the seed file to download. As yet additional peers request the same file each additional user becomes a part of the network from where the file can be downloaded. However, unlike a traditional peer-to-peer network, each new file downloader is receiving a different piece of the data from users who have already downloaded the file that together comprises the whole. This piecemeal system with multiple pieces of data coming from peer members is usually referred to as a "swarm." The effect of this technology makes every downloader also an uploader of the illegally transferred file(s). This means that every "node" or peer user who has a copy of the infringing copyrighted material on a torrent network can also be a source of download, and thus distributor for that infringing file.

Id.

Plaintiff goes on to allege that the possibility of successfully downloading increases when more peers join the swarm:

This distributed nature of BitTorrent leads to a rapid viral spreading of a file throughout peer users. As more peers join the swarm, the likelihood of a successful download increases. Because of the nature of a BitTorrent protocol, any seed peer that has downloaded a file prior to the time a subsequent peer downloads the same file can automatically be a source for the subsequent peer so long as that first seed peer's computer is online at the time the subsequent peer downloads a file. Essentially, because of the nature of the swarm downloads as described above, every infringer is stealing copyrighted material from other potential infringers in numerous jurisdictions around the world, and each is also distributing infringing material.

*2 *Id.* at ¶ 6.

According to plaintiff, Doe defendants' copyright infringements permit them and others to illegally obtain and distribute at no cost plaintiff's unauthorized copyrighted works. *Id.* at ¶ 8. Distributing even a portion of an unlawful copy of a copyrighted work, such as Dawn Rider, "can result in the nearly instantaneous worldwide distribution of that single copy to an unlimited number of people." *Id.*

On January 16, 2013, plaintiff filed the instant action, alleging that Doe defendants unauthorized copying, distribution and use of plaintiff's copyrighted work by the Doe defendants violated plaintiff's exclusive rights in Dawn Rider. *Id.* at ¶¶ 12–17. Plaintiff alleges that Doe defendants' willful, intentional, wanton and/or malicious and/or outrageous acts of copyright infringement (made with full knowledge of plaintiff's ownership copyrights of Dawn Rider) will cause plaintiff irreparable injury unless they are restrained and enjoined. *Id.* at ¶¶ 18–21. Plaintiff seeks statutory and punitive damages for each act of infringement of its copyright as well as costs

and attorneys' fees. *Id.* at ¶ 22–25. Plaintiff also seeks injunctive relief prohibiting each Doe defendant from further infringing plaintiff's copyright and ordering each defendant to destroy all copies of the copyrighted Dawn Rider made in violation of plaintiff's copyrights. *Id.* at ¶ 26.

At the time the action was filed, plaintiff did not know the names of the Doe defendants. *Id.* at ¶ 10. Instead, plaintiff knew each defendant only by (1) the internet protocol ("IP") address assigned to that defendant by his or her internet service provider, and (2) the date and time that the infringing activity of each defendant was observed. *Id.* See also *id.* at ¶ 16 ("The Plaintiff has identified each Defendant by the IP address assigned to that Defendant by his or her ISP and the date and at the time at which the infringing activity of each Defendant was observed."). Plaintiff alleges that each Doe defendant committed violations of the same law (17 U.S.C. § 101, *et seq.*) "within the same series of transactions or occurrences (e.g. downloading and distribution of the same copyrighted Motion Picture [Dawn Rider] owned by Plaintiff) and by using the same means (BitTorrent network)." *Id.* at ¶ 11. Plaintiff also alleges that "all of the infringements alleged in this lawsuit arise from the exact same unique copy of Plaintiff's movie as evidenced by the cryptographic hash value. The Defendants are all part of the exact same 'swarm.'" ¹ *Id.* According to plaintiff, the Doe defendants' illegal acts occurred in the same series of transactions and the Doe Defendants conspired together to copy and/or distribute Dawn Rider:

Defendants' acts occurred in the same series of transactions because each Defendant downloaded and/or distributed, or offered to distribute the Motion Picture [Dawn Rider] to other infringers on the network, including the Doe Defendants and/or other network users, who in turn downloaded and/or distributed the Motion Picture. Therefore, the Defendants each conspired with other infringers on the BitTorrent network to copy and/or distribute the Motion Picture, either in the same transaction or occurrence or a series of transactions or occurrences.

*3 *Id.*

On the same day that the *Complaint* was filed, plaintiff also filed an *ex parte* motion seeking to conduct limited, expedited discovery of non-party internet service providers in order to determine the identities

of defendants. Doc. No. 2. Specifically, plaintiff sought leave to serve a subpoena pursuant to Fed.R.Civ.P. 45 on certain ISPs in order to discover the name, address(es), telephone number(s), e-mail address(es) and MAC address of each Doe defendant that plaintiff has identified to date (as well as those plaintiff may identify in the future). *Id.* at 20–21. Plaintiff represents that it will use this information only for the purpose of pursuing its claims in this litigation. *Id.* at 21. This Court granted plaintiff's *ex parte* motion, concluding that plaintiff had established good cause because it could not meet its service obligation under Fed.R.Civ.P. 4 without the requested discovery. *Order*, Doc. No. 4, pp. 1–2.

On February 22, 2013, plaintiff issued a subpoena to WideOpenWest (“WOW”), seeking information attached to certain IP addresses (“the subpoenaed information”):

In accordance with the attached court order, please provide all records and information sufficient to identify the people or entities whose Internet Protocol Address (“IP Address”) are listed in Attachment A to this Subpoena including the following: personal and business names, any and all addresses, any and all telephone numbers, any and all e-mail addresses, and Media Access Control addresses (“MAC Addresses”).

Exhibit A, attached to Doc. Nos. 5 and 6 (“the subpoena”). The subpoena identified a response date of March 12, 2013, which was later extended to April 5, 2013. *Id.*; *Exhibit D*, attached to Doc. Nos. 5 and 6.

On February 28, 2013, WOW notified the persons associated with the identified IP addresses that WOW had received a subpoena seeking disclosure of its customer information. *Exhibit D*, attached to Doc. Nos. 5 and 6. WOW further advised these customers that it is legally obligated to respond to the subpoena, but that the customers associated with the targeted IP addresses could move to quash the subpoena. *Id.*

Thereafter, two of the Doe defendants, Nos. 163 and 189 (“the moving defendants”), filed motions to quash and motions to sever the claims against the various Doe

defendants. *See* Doc. Nos. 5 and 6. Plaintiff opposes these motions, Doc. Nos. 7 and 8, and the moving defendants have filed a reply, Doc. Nos. 9 and 10.² These matters are therefore now ripe for resolution.

II. REQUEST TO QUASH SUBPOENAS

A. Standard

The Federal Rules of Civil Procedure grant parties the right to “obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense....” Fed.R.Civ.P. 26(b)(1). Relevance for discovery purposes is extremely broad. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir.1998). However, “district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.” *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir.2007) (citing Fed.R.Civ.P. 26(b)(2)). In determining the proper scope of discovery, a district court balances a party's “right to discovery with the need to prevent ‘fishing expeditions.’” *Conti v. Am. Axle & Mfg.*, No. 08–1301, 326 Fed. Appx. 900, at *907 (6th Cir. May 22, 2009) (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir.1998)).

*4 Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a nonparty to, *inter alia*, produce documents. Fed.R.Civ.P. 45(a)(1). Rule 45 further provides that “the issuing court must quash or modify a subpoena that ... requires disclosure of privileged or other protected matter, if no exception or waiver applies; or subjects a person to undue burden.” Fed.R.Civ.P. 45(c)(3)(A)(iii), (iv). Although irrelevance or overbreadth are not specifically listed under Rule 45 as a basis for quashing a subpoena, courts “have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26.” *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (internal quotation marks omitted). The movant bears the burden of persuading the court that a subpoena should be quashed. *See, e.g., Baumgardner v. Louisiana Binding Serv.*, No. 1:11–cv–794, 2013 U.S. Dist. LEXIS 27494, at *4, 2013 WL 765574 (S.D. Ohio Feb. 28, 2013); *Williams v. Wellston City Sch. Dist.*, No. 2:09–cv–566, 2010 U.S. Dist. LEXIS 122796, at *21, 2010 WL 4513818 (S.D. Ohio Nov. 2, 2010).

B. Discussion

Although unclear at times, the motions appear to raise the following arguments in support of the requests to quash the subpoena: (1) the moving defendants have standing to challenge the subpoena, which requires the disclosure of privileged and/or protected information and which imposes an undue burden, *Motion*, pp. 2, 4; *Reply*, pp. 3–5; (2) the action is an effort to extort or coerce settlements, *Motion*, p. 4; *Reply*, pp. 3, 8–10, 19; and (3) the subpoena is not supported by good cause, *Motion*, p. 10; *Reply*, pp. 6–8. The Court shall address each argument in turn.

1. Standing

The parties disagree whether the moving defendants, who are not the recipients of the subpoena, have standing to challenge the subpoena directed to WOW, a third party. “[A]bsent a claim of privilege, a party has no standing to challenge a subpoena to a nonparty.” *Novovic v. Greyhound Lines, Inc.*, 2:09–CV–00753, 2012 U.S. Dist. LEXIS 9203, at *23, 2012 WL 252124 (S.D. Ohio Jan. 26, 2012) (quoting *Donahoo v. Ohio Dep’t of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002)) (internal quotation marks omitted). See also *Mann v. University of Cincinnati*, Nos. 95–3195 and 95–3292, 1997 U.S. App. LEXIS 12482, at *13, 1997 WL 280188 (6th Cir. May 27, 1997) (citing 9A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2459 (1995) (noting that “ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought”)); *Waite, Schneider, Bayless & Chesley Co. L.P.A. v. Davis*, No. 1:11–cv–0851, 2013 U.S. Dist. LEXIS 5253, at *14–15, 2013 WL 146362 (S.D. Ohio Jan. 14, 2013) (“The only basis upon which a party could have standing to quash a non-party subpoena would be a claim or personal right or privilege.”) (citing *Hackmann v. Auto Owners, Ins. Co.*, No. 2:05–cv–876, 2009 U.S. Dist. LEXIS 15128, 2009 WL 330314 (S.D. Ohio Feb. 6, 2009)) (internal citations omitted). Personal rights or privileges supporting a claim to standing “have been recognized with respect to personal bank records, information in a personnel file, corporate bank records, or Indian tribal records.” *Waite, Schneider, Bayless & Chesley Co. L.P.A.*, 2013 U.S. Dist. LEXIS 5253, at *15, 2013 WL 146362.

*5 Here, the Court understands that the moving defendants raise three arguments to support their claim to standing, which the Court shall address in turn.

a. Personal right and proprietary interest in confidential information

The moving defendants first argue that they have “standing to move to quash the subpoena because it seeks disclosure of identification information considered to be confidential and over which [the moving defendants have] personal and proprietary interests.” *Motion*, p. 2 (citing, *inter alia*, Fed.R.Civ.P. 45(c)(3)(A)). See also *Reply*, pp. 3–4 (citing cases for the proposition that a claim to personal right or privilege in the subpoenaed documents gives rise to a party’s standing to quash a nonparty subpoena and asserting that “Defendant has satisfied its burden.”). The moving defendants therefore apparently believe that the subpoenaed information (name, address, telephone number, e-mail address and MAC address associated with each IP address) is confidential and/or is information over which they have a personal or proprietary interest because they have an expectation of privacy in this information. See *Reply*, pp. 4–5 (citing *Third Degree Films, Inc. v. Does 1–108*, No. 11–3007, 2012 WL 716221, at *2 (D. Md. Feb. 28, 2012) (concluding that a Doe defendant has standing to challenge a subpoena because, *inter alia*, the Doe defendant has a privacy interest, however minimal, in the contact information associated with the IP address)). The moving defendants further contend that “this Court cannot conclude with any reasonable certainty that plaintiffs have overcome the expectation of privacy by putative defendants.” *Id.* at 5[sic].

Plaintiff disagrees, arguing that the moving defendants have no privacy right in the subpoenaed information and that plaintiff’s right to judicial process to protect its copyright outweighs any right to privacy or to remain anonymous under the First Amendment to the United States Constitution. *Memo. in Opp.*, pp. 4–5. Plaintiff further contends that the moving defendants had no reasonable expectation of privacy in the subpoenaed information because they voluntarily provided the information to a third-party ISP. *Id.* at 5.

Plaintiff’s arguments are well-taken. As an initial matter, the moving defendants have not explained how the subpoenaed information is similar to the type of information that this Court has previously recognized as giving rise to standing. See *Waite, Schneider, Bayless & Chesley Co. L.P.A.*, 2013 U.S. Dist. LEXIS 5253, at *15, 2013 WL 146362 (finding personal rights or privileges attach to “personal bank records, information

in a personnel file, corporate bank records, or Indian tribal records”). Moreover, the moving defendants have not described how, and the Court is not persuaded that, the subpoenaed records, if disclosed, would harm the moving defendants or otherwise invade their privacy. Indeed, another district court within this circuit recently rejected similar motions to quash a subpoena seeking the same information as does the instant subpoena. *See, e.g., Breaking Glass Pictures v. Doe*, No. 3:13-CV-75, 2013 U.S. Dist. LEXIS 83225, at *4-6, 2013 WL 2898026 (E.D. Tenn. June 13, 2013); *Sojo Prods., Inc. v. Does I-67*, Nos. 3:12-cv-599, 3:12-cv-600; 3:12-cv-601, 3:12-cv-602, 3:12-cv-603, 2013 U.S. Dist. LEXIS 58602, at *4-7, 2013 WL 1759561 (E.D. Tenn. Apr. 24, 2013); *Safety Point Prods. v. Does I-57*, No. 3:12-cv-601, 2013 U.S. Dist. LEXIS 49521, at *3-5, 2013 WL 1398585 (E.D. Tenn. Apr. 5, 2013). In permitting expedited discovery so as to enable plaintiffs in those cases to identify the unknown defendants, the District Court for the Eastern District of Tennessee noted that the defendants had not identified any privilege (such as attorney-client or doctor-patient privilege) “that protects a person’s name, address or phone from disclosure.” *Breaking Glass Pictures*, 2013 U.S. Dist. LEXIS 83225, at *5, 2013 WL 2898026. *See also Sojo Prods., Inc.*, 2013 U.S. Dist. LEXIS 58602, at *5-6, 2013 WL 1759561 (same). *Cf. Safety Point Prods.*, 2013 U.S. Dist. LEXIS 49521, at *3-4, 2013 WL 1398585. That court concluded that the unidentified defendants had no reasonable expectation of privacy in the subpoenaed information because the defendants had already shared that information with the ISP in order to obtain internet service. *Safety Point Prods.*, 2013 U.S. Dist. LEXIS 49521, at *4-5, 2013 WL 1398585; *Sojo Prods., Inc.*, 2013 U.S. Dist. LEXIS 58602, at *5-6, 2013 WL 1759561 (same). *Cf. Breaking Glass Pictures*, 2013 U.S. Dist. LEXIS 83225, at *5, 2013 WL 2898026 (concluding that requested information is neither privileged nor protected because defendants already shared the information with the ISP). The Court finds this reasoning persuasive.³

*6 For all of these reasons, the Court concludes that the moving defendants have failed to establish that they have standing to quash the subpoena based on a personal or proprietary interest in the subpoenaed information.

b. Undue burden

The moving defendants also argue that they have “standing to move to quash the subpoena because it

imposes an undue burden under Fed.R.Civ.P. 45(c)(3)(A)(iv).” *Motion*, p. 2.⁴ *See also id.* at 3-4 (“If this Court should force Wide Open West to turn over the requested information, the risk [the moving defendants] would suffer reputational injury even if Plaintiffs [sic] allegations are later disproven are too great and present an undue burden to [the moving defendants] under Fed.R.Civ.P. 45(c)(3)(a)(iv) [sic].”). Plaintiff, however, contends that the moving defendants, who are not the responding parties to the subpoena, lack standing to assert that production of the subpoenaed information imposes an undue burden. *Memo. in Opp.*, pp. 5-6.

The moving defendants’ suggestion that they personally will face an undue burden if WOW produces the subpoenaed information is unavailing. Rule 45 requires that the party issuing the subpoena “take steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Fed.R.Civ.P. 45(c)(1) (emphasis added). *Cf. Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir.2008) (“[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.”) (quoting *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir.2007)) (emphasis added). Accordingly, this Court and another district court in this circuit have previously concluded that only the entity responding to the subpoena has standing to challenge the subpoena on the basis of undue burden. *See Levitin v. Nationwide Mut. Ins. Co.*, 2:12-cv-34, 2012 U.S. Dist. LEXIS 177738, at *14-15, 2012 WL 6552814 (S.D. Ohio Dec. 14, 2012) (“Here, the subpoenas are directed to Plaintiff’s prior employers. Thus, only Plaintiff’s prior employers have standing to challenge the subpoenas on the ground that production of the subpoenaed documents would pose an undue burden expense.”); *McNaughton-McKay, Elec. Co. v. Linamar Corp.*, No. 09-cv-11165, 2010 U.S. Dist. LEXIS 59275, at *9-10, 2010 WL 2560047 (E.D. Mich. June 15, 2010) (“Defendant [which was not the recipient of the subpoena] does not have standing to argue that Chrysler’s compliance with the subpoena will cause undue burden where Chrysler has not objected to the subpoena on this ground.”). *Cf. Donahoo v. Ohio Dep’t of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio Mar. 1, 2002) (“The party to whom the subpoena is directed is the only party with standing to oppose it.”).

Here, the moving defendants are not required to respond to the subpoena; it is WOW which is the responding party. WOW has not moved to quash the subpoena, nor has it even suggested that responding to the subpoena will impose an undue burden on it. Moreover, plaintiff's representation that WOW has already produced subpoenaed information regarding other Doe defendants is uncontroverted. *See Memo. in Opp.*, p. 6 ("In fact Wide Open West has not only represented that it will respond to the subpoenas after giving its customers thirty days' notice, it has actually responded by providing the information for other John Doe Defendants as of 4/15/13."). Under these circumstances, the moving defendants have not established that they have standing because the subpoena imposes an undue burden on them.

c. "Affected by" the subpoena

*7 Finally, the moving defendants' conclusory reference to Fed.R.Civ.P. 45(c)(3)(B) does not confer standing on the moving defendants. *Motion*, p. 2 (citing, without elaborating, that this subsection "allows a person affected by, but not subject to, a subpoena to move to quash to [sic] subpoena"). To the extent that the moving defendants' reliance on this provision suggests that they are "affected by" the subpoena because they have a personal or proprietary interest or because the subpoena imposes an undue burden, those arguments fail for the reasons discussed *supra*. Similarly, to the extent that the conclusory reference is based on alleged reputational harm, *see id.*, that assertion is without merit for the reasons discussed *infra*. Accordingly, the Court cannot conclude that the moving defendants have standing to object to the subpoena or that the subpoena imposes an undue burden on the moving defendants.

2. Risk of extortion

Even if the moving defendants had standing to challenge the subpoena, their arguments contesting production of the subpoenaed information would nevertheless be unpersuasive. For example, the moving defendants contend that a subscriber is not necessarily responsible for illegal downloads simply because that activity is associated with a subscriber's address: Multiple individuals may use a single IP address and any one of those users, other than the subscriber, may have improperly downloaded protected information. *Reply*, pp. 1-3. The moving defendants therefore argue that some courts (but not within this circuit) have recognized

that "[t]his type of fishing expedition [obtaining identity and contact information of subscribers] leads to an extortion risk [.]" *Motion*, p. 4 (citing *VPR Internationale v. Does 1-1017*, No. 11-2068, 2011 U.S. Dist. LEXIS 64656, at *4, 2011 WL 8179128 (C.D.Ill. Apr. 29, 2011)). More specifically, the moving defendants suggest that the prospect of public embarrassment arising from disclosure of their identities pressures innocent Doe defendants into settlements. *See Reply*, pp. 3 ("This risk of false positives gives rise to the potential for coercing unjust settlements from innocent defendants such as individuals who want to avoid the embarrassment of having their names publicly associated with allegations of illegally downloading.") (citing *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y.2012)), 8-10, 19 ("Plaintiff may be merely seeking this contact information in order to bother a list of IP address holders who are not reliably going to be found infringers, with unfounded allegations and demands for payment.").

However, other than these generalized fears, the moving defendants have offered no evidence (or even allegations) that the plaintiff in this action has engaged in abusive litigation tactics. Under these circumstances, the Court is not persuaded that imputing such guilt to plaintiff and precluding the pursuit of this action is appropriate. *See, e.g., Malibu Media, LLC v. Doe*, 285 F.R.D. 273, 278 (S.D.N.Y.2012) ("[N]one of the instances of improper litigation tactics that have been brought to our attention involve plaintiff or plaintiff's counsel. We are reluctant to prevent plaintiff from proceeding with its case based only on a 'guilt-by-association' rationale."). The Court also notes that, unlike the allegations of illegal downloads in other actions addressing coercive settlements, *cf. id.*, this litigation does not involve the alleged downloading of pornography. Moreover, even if this case did present a risk of public embarrassment, the Doe defendants may take measures to protect themselves. *See, e.g., Malibu Media, LLC v. Doe*, 902 F.Supp.2d 690 (E.D.Penn.2012) (granting motions to proceed anonymously). Additionally, should the Doe defendants later establish that plaintiff's claims have been vexatiously pursued or frivolous, or if the Doe defendants prevail in this action, they may seek sanctions and/or reimbursement for their costs and fees. *See Fed.R.Civ.P.* 11; 28 U.S.C. § 1927; 17 U.S.C. § 505; Fed.R.Civ.P. 54. For all these reasons, the moving defendants' motions to quash the subpoena based on a generalized fear of extortion is not well-taken.

3. Good cause

*8 The moving defendants also argue that the Court should quash the subpoena because it is not supported by good cause. *Motion*, p. 10 (“Good cause exists to quash the subpoena served on Wide Open West to compel the disclosure of the name, address, telephone number and e-mail address of [the moving defendants].”); *Reply*, pp. 6–8 (arguing that determining whether good cause exists to permit expedited discovery requires a showing of good cause and citing to cases outside this circuit for factors that the court must weigh), 19 (“Good cause exists to quash the subpoena[.]”). For example, the moving defendants contend that the subpoenaed information does not establish that the subscribers are the actual infringers. *Reply*, pp. 6–8.

The moving defendants' arguments are not well-taken. As noted *supra*, this Court previously concluded that plaintiff's request for expedited discovery was supported by good cause. *Order*, Doc. No. 4 (citing *Arista Records, LLC v. Does 1–15*, 2007 WL 5254326, *2) (S.D. Ohio May 17, 2007)). See also *Breaking Glass Pictures v. Does*, No. 2:13-cv-389, 2013 U.S. Dist. LEXIS 88090, 2013 WL 3208506 (S.D. Ohio June 24, 2013) (finding good cause and permitting expedited discovery in copyright infringement case in order to obtain the identity of each Doe defendant). To the extent that the moving defendants apparently ask the Court to revisit this conclusion, they have offered nothing to establish that the prior decision was erroneous. For example, the moving defendants argue at length that the mere identification of the subscriber does not necessarily establish that the subscriber was the person who illegally downloaded the copyrighted work. *Reply*, pp. 6–8. However, nothing in Rule 45 permits a court to quash a subpoena based on “a general denial of liability.” See, e.g., *First Time Videos, LLC v. Doe*, 276 F.R.D. 241, 250 (N.D. Ill. 2011). See also Fed.R.Civ.P. 45. Instead, arguments related to the merits of the allegations are appropriately addressed in the context of a motion to dismiss or a motion for summary judgment rather than on a motion to quash. See, e.g., *First Time Videos, LLC*, 276 F.R.D. at 250.

The moving defendants' arguments related to privacy and abusive litigation tactics, *Reply*, pp. 8–9, are likewise unavailing for the reasons discussed *supra*. Similarly, arguments that the subpoenaed information is irrelevant because that information “cannot give you the identity

of the infringer [.]” *Motion*, p. 9, are not well-taken. As this Court previously concluded, plaintiff cannot meet its service obligation under Fed.R.Civ.P. 4 without the requested discovery. *Order*, Doc. No. 4, pp. 1–2. Moreover, Rule 26 authorizes broad discovery, including discovery that “appears reasonably calculated to lead to the discovery of admissible evidence.” Fed.R.Civ.P. 26(b) (1). Therefore, even if discovery later reveals that it was someone other than the subscriber who violated plaintiff's copyright, the subpoenaed information (the subscriber's contact information) is likely to lead to the discovery of admissible information, *i.e.*, the identity of the actual infringer. In short, the moving defendants' request to quash the subpoena is without merit.

III. REQUESTS TO SEVER THE DOE DEFENDANTS

*9 The moving defendants also ask the Court to sever the Doe defendants, contending that joinder is improper under Fed.R.Civ.P. 20. *Motion*, pp. 4–9; *Reply*, pp. 10–16. Rule 20 permits persons to be joined as defendants in one action if (1) “any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences[.]” and (2) the claims against the various defendants share a common question of law or fact. Fed.R.Civ.P. 20(a)(2). “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). See also *Brown v. Worthington Steel*, 211 F.R.D. 320, 324 (S.D. Ohio 2002) (“Courts liberally permit joinder under Rule 20(a).”) (citing *United Mine Workers of Am.*, 383 U.S. at 724). To that end, courts in this circuit give the terms “transaction” and “occurrence” a broad and liberal interpretation. *Lasa Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969). “The purpose of Rule 20(a) is to promote judicial economy and trial convenience.” *Evans v. Midland Funding LLC*, 574 F.Supp.2d 808, 811 (S.D. Ohio 2008) (quoting *Lee v. Dell Products, L.P.*, No. 3:06cv0001, 2006 U.S. Dist. LEXIS 75573, 2006 WL 2981301, *7, 2006 WL 2981301 (M.D. Tenn. Oct. 16, 2006) (internal quotation marks omitted)).

“However, even if the requirements of Rule 20 are met, a district court nevertheless retains considerable discretion

to sever defendants if it finds that the objectives of the rule are not fostered, or that joinder would result in prejudice, expense, or delay.” *Voltage Pictures, LLC v. Does 1–43*, No. 1:13CV465, 2013 U.S. Dist. LEXIS 63764, at *5, 2013 WL 1874862 (N.D. Ohio May 3, 2013). The Court shall address each of the requirements under Rule 20(a)(2) in turn.

A. Same Transaction or Series of Transactions

The moving defendants specifically argue that the mere allegations that the Doe defendants acted as a “swarm” or participated in BitTorrent technology is insufficient to establish that they engaged in a single transaction or in a series of closely related transactions under Rule 20. *Motion*, pp. 4–8; *Reply*, pp. 10–17. Both parties acknowledge, *see Memo. in Opp.*, p. 7; *Reply*, p. 10, and this Court agrees, that federal courts within this circuit and across the country⁵ are divided on whether or not membership in the same swarm satisfies the joinder requirements under Rule 20. *See, e.g., Voltage Pictures, LLC*, 2013 U.S. Dist. LEXIS 63764, at *5–6, 2013 WL 1874862 (collecting cases); *Patrick Collins, Inc.*, 2013 U.S. Dist. LEXIS 50674, at *12–14 (same); *Third Degree Films, Inc. v. Doe*, No. 12–cv–14106, 2013 U.S. Dist. LEXIS 44131, at *17 (E.D. Mich. Mar. 18, 2013) (“In short, the heart of this disagreement is whether the mere alleged participation of a group of defendants in the same ‘swarm’ is, in itself, sufficient to satisfy Rule 20(a)(2)’s ‘same transaction, occurrence, or series of transactions or occurrences’ requirement, or if it instead simply shows that the defendants ‘committed the same type of violation in the same way.’”) (quoting *Next Phase Distrib., Inc. v. John Does 1–27*, 284 F.R.D. 165, 168–69 (S.D.N.Y. 2012)).

*10 Some courts severing claims in swarm cases have concluded that simply participating in a swarm does not necessarily establish that defendants participated in the same transaction or occurrence. *See, e.g., Night of the Templar, LLC*, 2013 U.S. Dist. LEXIS 51625, at *9–10, 2013 WL 1500454 (“‘Merely alleging that the Doe defendants all used the same filesharing protocol, BitTorrent, to conduct copyright infringement of Plaintiff’s film without any indication that they acted in concert fails to satisfy the arising out of the ... same series of transactions or occurrences requirement.’”) (quoting *Hard Drive Prod., Inc. v. Does 1–188*, 809 F.Supp.2d 1150, 1151 (N.D. Cal. 2011)); *Patrick Collins, Inc. v. Doe*, No. 11–cv–15231, 2012 U.S. Dist. LEXIS 40536, at *9–13,

2012 WL 1019034 (E.D. Mich. Mar. 26, 2012) (“[T]he the court concludes that simply alleging the use of BitTorrent technology, like earlier P2P file sharing protocols, does not comport with the requirements under Rule 20(a) for permissive joinder.”). For example, unknown defendants may access the swarm at different times. *Night of the Templar, LLC*, 2013 U.S. Dist. LEXIS 51625, at *10, 2013 WL 1500454 (“Plaintiff’s IP address exhibits indicate that Defendants accessed the swarm at different times, on different days, using different BitTorrent clients. This suggests that Defendants were not wrapped up in a single factual occurrence.”) (internal citations omitted); *Patrick Collins, Inc.*, 2012 U.S. Dist. LEXIS 40536, at *10, 2012 WL 1019034 (“Each of the IP addresses connected to the investigative server at different times and dates to download a piece of the Work and there is no allegation that any of the computers associated with the IP addresses downloaded or uploaded pieces of the Work with each other.”). Accessing a swarm at different times suggests that computer users were not acting simultaneously or in concert, which persuades some courts that the actions of those users were not part of the same transaction or series of transactions. *See, e.g., Patrick Collins, Inc.*, 2012 U.S. Dist. LEXIS 40536, at *12, 2012 WL 1019034 (“The absence of information concerning the number of total users in the swarm, coupled with the BitTorrent protocol’s ability to quickly share files further demonstrates that it is implausible that any of the Doe defendants were *simultaneously* sharing pieces of plaintiff’s Work”) (emphasis added); *Patrick Collins, Inc. v. Doe*, No. 12–12596, 2012 U.S. Dist. LEXIS 187556, at *3–4 (E.D. Mich. Aug. 28, 2012) (“This, combined with the fact that ‘its users share files in relatively quick time frame, ranging anywhere from fifteen minutes to a few hours,’ means that it is seemingly implausible that any of the Doe defendants *simultaneously* shared pieces of the Work with each other, and thus acted ‘*in concert*’ sufficient to grant permissive joinder under Rule 20(a).”) (emphasis added).

Conversely, some courts have concluded that joinder under Rule 20 does not necessarily require simultaneous or concerted action. *See, e.g., Patrick Collins Inc. v. John Does 1–28*, No. 12–13670, 2013 U.S. Dist. LEXIS 11349, at *21, 2013 WL 359759 (E.D. Mich. Jan. 29, 2013) (“Joinder under the federal rules, however, does not require simultaneity—‘concerted action is not required for joinder.’”) (quoting *Patrick Collins, Inc. v. Doe*, 282 F.R.D. 161, 168 (E.D. Mich. 2012)); *Nucorp, Inc. v. Does 1–24*, No. 2:11–CV–15222, 2012 U.S. Dist. LEXIS 187547,

at *14 (E.D.Mich. Oct. 18, 2012) (“[C]oncerted action is not a requirement for joinder under Rule 20(a)(2).”) (emphasis in original); *Patrick Collins, Inc.*, 282 F.R.D. at 167 (“But, a concert of action is not required since Plaintiff alleges a right to relief severally against Defendants.”). Instead, “[o]ther courts have permitted joinder, based on the theory that the claims are ‘logically related,’ and that the collaborative activity of the members of the swarm demonstrates that they engaged in the same transaction or series of transactions.” *Voltage Pictures, LLC*, 2013 U.S. Dist. LEXIS 63764, at *6, 2013 WL 1874862 (collecting cases). See also *Patrick Collins Inc. v. John Does 1–28*, No. 12–13670, 2013 U.S. Dist. LEXIS 11349, at *14–15, 2013 WL 359759 (E.D.Mich. Jan. 29, 2013) (“The ‘logical relationship’ test, in turn, ‘is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant. In other words, the defendants’ allegedly infringing acts, which give rise to the individual claims of infringement, must share an aggregate of operative facts.’”) (quoting *In re EMC Corp.*, 677 F.3d 1351, 1358 (Fed.Cir.2012)). In addition, at least one district court in this circuit has concluded that allegations that defendants, *inter alia*, used the same digital file satisfied Rule 20(a)(2)’s “same transaction, occurrence, or series of transactions or occurrences” requirement. *Third Degree Films v. Does 1–36*, No. 11–CV–15200, 2012 U.S. Dist. LEXIS 87891, at *28–32, 2012 WL 2522151 (E.D.Mich. May 29, 2012). See also *Patrick Collins, Inc. v. John Does 1–33*, No. 4:12–cv–13309, 2013 U.S. Dist. LEXIS 50674 (E.D.Mich. Feb. 27, 2013) (recommending, *inter alia*, that motions to sever be denied without prejudice where defendants shared the same digital file in the same swarm). Cf. *Voltage Pictures, LLC*, 2013 U.S. Dist. LEXIS 63764, at *8–11, 2013 WL 1874862 (finding that allegations that unknown defendants participating in the same swarm downloading the same motion picture was sufficient to support permissive joinder at the preliminary stage).

*11 In *Third Degree Films*, the district court noted that, by virtue of uploading in a swarm, the unknown defendants helped pass on pieces of the copyrighted work:

[E]ach defendant allegedly participated in the same swarm for the same digital encoding of the Work and thereby jointly contributed to the illegal distribution of the Work to others. By undoubtedly uploading to other

peers in the swarm, which enabled those peers to upload to still other peers, all 36 Doe Defendants jointly contributed to either growing the swarm or maintaining its existence.

Id. at *27–28. See also *Voltage Pictures, LLC*, 2013 U.S. Dist. LEXIS 63764, at *11 n. 2, 2013 WL 1874862 (“[E]ach [defendant] participated in the BitTorrent swarm as an uploader (distributor) and downloader (copier) of the illegally transferred file.”); *Patrick Collins Inc.*, 2013 U.S. Dist. LEXIS 11349, at *18–19, 2013 WL 359759 (“[I]t is difficult to see how the sharing and downloading activity alleged in the Complaint—a series of individuals connecting either directly with each other or as part of a chain or ‘swarm’ of connectivity designed to illegally copy and share the exact same copyrighted file—could not constitute a ‘series of transactions or occurrences’ for purposes of Rule 20(a).”) (quoting *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 244 (S.D.N.Y.2012)) (emphasis in original). Although the court in *Third Degree Films* acknowledged that future discovery might reveal that the plaintiff had failed to satisfy the requirements for joinder under Rule 20(a) (2) or that severance is appropriate, that court nevertheless concluded that joinder was proper at the initial stages of the litigation. *Third Degree Films*, 2012 U.S. Dist. LEXIS 87891, at *29–33, 2012 WL 2522151.

Here, the *Complaint* alleges that the Doe defendants used the BitTorrent protocol to join together in a “swarm” in order to illegally download copyrighted material. *Complaint*, ¶ 5. More specifically, the *Complaint* alleges that the unidentified defendants all violated the same law (17 U.S.C. § 101 *et seq.*) in the same series of transactions (downloading and distributing the same file, Dawn Rider) by using the same means (the BitTorrent protocol). *Id.* at ¶ 11. According to plaintiff, “[t]he infringed work was included in one file related to the torrent file; in other words, all of the infringements alleged in this lawsuit arise from the exact same unique copy of Plaintiff’s movie as evidenced by the cryptographic hash value.” *Id.* The unknown defendants’ alleged wrongful acts occurred in the same series of transactions or occurrences because each defendant downloaded and/or distributed, or offered to distribute Dawn Rider to other infringers on the network who in turn downloaded and/or distributed this movie. *Id.* Plaintiff therefore believes that the unidentified defendants “each conspired with other infringers on the BitTorrent network to copy and/or distribute the Motion

Picture, either in the same transaction or occurrence or in a series of transactions or occurrences.” *Id.*

*12 Construing the terms “transaction” and “occurrence” broadly, *see Lasa Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d at 147, and keeping in mind that joinder is strongly encouraged, *see United Mine Workers of Am. v. Gibbs*, 383 U.S. at 724, this Court concludes that plaintiff has alleged facts sufficient to satisfy the “same transaction, occurrence, or series of transactions or occurrences” requirement at this preliminary stage of proceedings. *See, e.g., Third Degree Films*, 2012 U.S. Dist. LEXIS 87891, at *29–33, 2012 WL 2522151; *Patrick Collins, Inc. v. Doe*, 286 F.R.D. 319, 321–22 (E.D.Mich.2012).

B. Common Question of Law or Fact

Rule 20 also requires that a plaintiff establish that claims against all defendants share a common question of fact or law. Fed.R.Civ.P. 20(a)(2)(B). Here, as discussed *supra*, plaintiff has alleged that the Doe defendants (1) violated the same law (17 U.S.C. § 101 *et seq.*); (2) infringed plaintiff's rights in Dawn Rider by using the same digital file; and (3) used the same BitTorrent protocol. The Court concludes that these allegations, at this preliminary stage, satisfy Rule 20(a)(2)(B). *See, e.g., Third Degree Films*, 2012 U.S. Dist. LEXIS 87891, at *13–14 (finding that the plaintiff had adequately pled facts satisfying Rule 20(a)(2)(B) where plaintiff alleged the same causes of action involving the same digital file and the same investigation led to discovery of defendants' IP addresses); *Patrick Collins, Inc. v. John Does 1–33*, No. 4:12–cv–13309, 2013 U.S. Dist. LEXIS 50674, at *11 (same); *Patrick Collins, Inc. v. Doe*, 286 F.R.D. at 322.

C. Other Considerations

In addition to arguing that plaintiff has failed to satisfy the requirements for joinder under Rule 20(a)(2), the moving defendants apparently also ask this Court to sever the claims against the defendants because of, *inter alia*, the “tremendous risk of creating unfairness and denying individual justice to those sued” as well as the risk of extortion. *See, e.g., Motion*, p. 5; *Reply*, pp.

15, 17. In reaching its decision to deny the moving defendants' request to sever, this Court is aware of these concerns, which have been echoed in the decisions of other courts. *Cf. Night of the Templar, LLC v. Doe*, No. 1:13–CV–396, 2013 U.S. Dist. LEXIS 51625, at *5, 2013 WL 1500454 (“Rather, plaintiffs often seek to take advantage of the resources of federal courts to force small, individual settlements.”); *Third Degree Films, Inc. v. Doe*, No. 12–cv–14106, 2013 U.S. Dist. LEXIS 44131, at *36–44 (noting the risk of forced settlements and a plaintiff's desire to join defendants in order to avoid paying multiple filing fees). However, as discussed *supra*, the law affords remedies should defendants establish that plaintiff has engaged in abusive litigation tactics or that plaintiff's claims are frivolous. *See Fed.R.Civ.P.* 11; 28 U.S.C. § 1927; 17 U.S.C. § 505; *Fed.R.Civ.P.* 54. *See also Patrick Collins, Inc. v. John Does 1–33*, No. 4:12–cv–13309, 2013 U.S. Dist. LEXIS 50674, at *25–27 (declining to exercise discretionary severance on the basis of general fears of forced settlement in the absence of case-specific allegations of coercion). In light of these safeguards, the Court is not persuaded that its discretion is best exercised in severing the claims at this stage of the proceedings. *Cf. Sojo Prod. Inc. v. Does 1–67*, Nos. 3:12–CV–599, 3:12–CV–600, 3:12–CV–601, 3:12–CV–602, 3:12–CV–603, 2013 U.S. Dist. LEXIS 58602, at *8, 2013 WL 1759561 (E.D.Tenn. Apr.24, 2013) (denying without prejudice request as “premature. The Court does not have information sufficient to gauge the appropriateness of the joinder of the Defendants at this time, and severing these claims at this early stage of litigation is likely to cause delays and hinder disposition of these matters”).

*13 WHEREUPON, defendant Doe No. 163's *Motion to Quash Subpoena and Motion for Severance*, Doc. No. 5 (“*Doe No. 163's Motion*”) and defendant Doe No. 189's *Motion to Quash Subpoena and Motion for Severance*, Doc. No. 6, are **DENIED**.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3322221

Footnotes

- 1 "That value acts as a 'unique digital fingerprint' that ensures a piece of data belongs in a particular torrent file." *Malibu Media, LLC v. Pelizzo*, NO. 12-22768-CIV-SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 180980, at *4, 2012 WL 6680387 (S.D.Fla. Dec. 21, 2012) (citations omitted).
- 2 The motions to quash and motions to sever, as well as the opposing memoranda and reply memoranda, are identical except for reference to the specific moving Doe defendant. For ease of reference, the Court will refer only to the first filed motion and related briefs, *i.e.*, *Motion to Quash and Motion to Sever*, Doc. No. 5 ("Motion"); *Plaintiff's Memorandum in Opposition to Defendant Doe No. 163's Anonymous Motion to Quash Subpoena and Motion for Severance*, Doc. No. 7 ("Memo. in Opp."); *Reply Memorandum in Support of Motion to Quash Subpoena and Motion for Severance*, Doc. No. 9 ("Reply").
- 3 To the extent that they may have asserted such an argument, *see Reply*, p. 6, the moving defendants similarly fail to explain how production of the subpoenaed information infringes on any First Amendment right. Moreover, it is well-established that the First Amendment does not protect copyright infringement. *See, e.g., Breaking Glass Pictures*, 2013 U.S. Dist. LEXIS 83225, at *6, 2013 WL 2898026 (citing *First Time Videos v. Does 1-500*, 276 F.R.D. 241 (N.D.Ill.2011)); *Sojo Prods., Inc.*, 2013 U.S. Dist. LEXIS 58602, at *6-7, 2013 WL 1759561 (same).
- 4 As discussed *supra*, this subdivision provides, in pertinent part, that "the issuing court must quash or modify a subpoena that ... subjects a person to undue burden." Fed.R.Civ.P. 45(c) (3)(A)(iv).
- 5 Even district courts within the same district in this circuit are split. *See, e.g., Voltage Pictures, LLC*, 2013 U.S. Dist. LEXIS 63764, at *11-12, 2013 WL 1874862 (permitting joinder); *Night of the Templar, LLC v. Doe*, No. 1:13-CV-396, 2013 U.S. Dist. LEXIS 51625, at *11, 2013 WL 1500454 (N.D.Ohio Apr. 10, 2013) (severing claims after finding that "participation in a specific swarm is too imprecise a factor absent additional information relating to the alleged copyright infringement to support joinder under Rule 20(a)"); *Patrick Collins, Inc. v. John Does 1-33*, No. 4:12-cv-13309, 2013 U.S. Dist. LEXIS 50674 (E.D.Mich. Feb. 27, 2013) (denying request to sever claims); *Patrick Collins, Inc. v. Doe*, No. 11-cv-15231, 2012 U.S. Dist. LEXIS 40536, at *9-13, 2012 WL 1019034 (E.D.Mich. Mar. 26, 2012) (finding that alleged participation in a swarm did not support joinder under Rule 20).

2013 WL 4805022

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.

TCYK, LLC, Plaintiff,

v.

John DOES 1-47, Defendants.

No. 2:13-cv-539.

|

Sept. 9, 2013.

Attorneys and Law Firms

David John Butler, Taft Stettinius & Hollister LLP, Leon
David Bass, Columbus, OH, for Plaintiff.

OPINION AND ORDER

NORAH McCANN KING, United States Magistrate
Judge.

*1 This is a copyright action in which plaintiff alleges that defendants copied and distributed plaintiff's copyrighted work, the motion picture "The Company You Keep." *Complaint*, Doc. No. 1, 915. Defendants are otherwise identified only by IP addresses. *Exhibit B*, attached to *Complaint*. This matter is now before the Court on defendant Doe No. 19's *Motion to Quash Subpoena Served Upon Costodian [sic] of Records, Wide Open West, and Request for Protective Order ("Motion to Quash")*, Doc. No. 5. Plaintiff opposes the *Motion to Quash*. Plaintiff's Memorandum in *Opposition to Defendant Doe No. 19's Motion to Quash or Modify Subpoena ("Plaintiff's Response")*, Doc. No. 7. Defendant Doe No. 19 has not filed a reply. For the reasons that follow, defendant's *Motion to Quash* is **DENIED**.

I. BACKGROUND

Plaintiff TCYK, LLC, is a developer, producer, and/or distributor of motion pictures and has exclusive ownership rights over a motion picture entitled "The Company You Keep." *Complaint*, ¶¶ 5, 8, 9. Plaintiff alleges that unidentified defendant Does 1-47 (collectively, "Doe defendants" or "unidentified defendants") copied and

distributed plaintiff's copyrighted work, *The Company You Keep*. *Id.* at ¶ 5. According to plaintiff, Doe defendants used a peer-to-peer ("P2P") network known as "BitTorrent protocol" or "torrent." *Id.* Plaintiff alleges that individuals, such as the unidentified defendants, joined together as a "swarm" in order to use the BitTorrent protocol to illegally download copyrighted material:

The BitTorrent protocol makes even small computers with low bandwidth capable of participating in large data transfers across a P2P network. The initial file-provider intentionally elects to share a file with a torrent network. This initial file is called a seed. Other users ("peers") connect to the network and connect to the seed file to download. As yet additional peers request the same file each additional user becomes a part of the network from where the file can be downloaded. However, unlike a traditional peer-to-peer network, each new file downloader is receiving a different piece of the data from users who have already downloaded the file that together comprises the whole. This piecemeal system with multiple pieces of data coming from peer members is usually referred to as a "swarm." The effect of this technology makes every downloader also an uploader of the illegally transferred file(s). This means that every "node" or peer user who has a copy of the infringing copyrighted material on a torrent network can also be a source of download, and thus distributor for that infringing file.

Id.

Plaintiff goes on to allege that the possibility of successfully downloading increases when more peers join the swarm:

This distributed nature of BitTorrent leads to a rapid viral spreading of a file throughout peer users. As more peers join the swarm, the likelihood of a successful download increases. Because of the nature of a BitTorrent protocol, any seed peer that has downloaded a file prior to the time a subsequent peer downloads the same file can automatically be a source for the subsequent peer so long as that first seed peer's computer is online at the time the subsequent peer downloads a file. Essentially, because of the nature of the swarm downloads as described above, every infringer is stealing copyrighted material from other potential infringers in numerous jurisdictions around the world, and each is also distributing infringing material.

*2 *Id.* at 916.

According to plaintiff, Doe defendants' copyright infringements permit them and others to illegally obtain and distribute plaintiff's copyrighted works at no cost. *Id.* at 918. Distributing even a portion of an unlawful copy of a copyrighted work, such as The Company You Keep, "can result in the nearly instantaneous worldwide distribution of that single copy to an unlimited number of people." *Id.*

Plaintiff filed this action on June 5, 2013, alleging that the Doe defendants' unauthorized copying, distribution, and use of plaintiff's copyrighted work violated plaintiff's exclusive rights in The Company You Keep. *Id.* at 919112-17. Plaintiff alleges that the Doe defendants' willful, intentional, wanton and/or malicious and/or outrageous acts of copyright infringement (made with full knowledge of plaintiff's ownership copyrights of The Company You Keep) will cause plaintiff irreparable injury unless they are restrained and enjoined. *Id.* at 919118-21. Plaintiff seeks statutory and punitive damages for each act of infringement of its copyright as well as costs and attorneys' fees. *Id.* at 9122-25. Plaintiff also seeks injunctive relief prohibiting each Doe defendant from further infringing plaintiff's copyright and ordering each defendant to

destroy all copies of the copyrighted The Company You Keep made in violation of plaintiff's copyrights. *Id.* at 9126.

Plaintiff did not know the names of the Doe defendants at the time the action was filed. *Id.* at 9110. Instead, plaintiff knew each defendant only by (1) the internet protocol ("IP") address assigned to that defendant by his or her internet service provider ("ISP") and (2) the date and time that the infringing activity of each defendant was observed. *Id.* at 919110, 16. Plaintiff alleges that each Doe defendant committed violations of the same law (17 U.S.C. § 101, *et seq.*) "within the same series of transactions or occurrences (e.g. downloading and distribution of the same copyrighted Motion Picture [The Company You Keep] owned by Plaintiff) and by using the same means (BitTorrent network)." *Id.* at 9111. Plaintiff also alleges that "all of the infringements alleged in this lawsuit arise from the exact same unique copy of Plaintiff's movie as evidenced by the cryptographic hash value.¹ The Defendants are all part of the exact same 'swarm.'" *Id.* According to plaintiff, the Doe defendants' illegal acts occurred in the same series of transactions and the Doe Defendants conspired together to copy and/or distribute The Company You Keep:

Defendants' acts occurred in the same series of transactions because each Defendant downloaded and/or distributed, or offered to distribute the Motion Picture [The Company You Keep] to other infringers on the network, including the Doe Defendants and/or other network users, who in turn downloaded and/or distributed the Motion Picture. Therefore, the Defendants each conspired with other infringers on the BitTorrent network to copy and/or distribute the Motion Picture, either in the same transaction or occurrence or a series of transactions or occurrences.

*3 *Id.*

On the same day that the *Complaint* was filed, plaintiff also filed an *ex parte* motion seeking to conduct limited, expedited discovery of non-party internet service providers in order to determine the identities of defendants. Doc. No. 3. Specifically, plaintiff sought leave to serve a subpoena pursuant to Fed.R.Civ.P. 45 on certain ISPs in order to discover the name, address(es), telephone number(s), e-mail address(es), and Media Access Control ("MAC") addresses of each Doe defendant whom plaintiff has identified to date (as well as

those whom plaintiff may identify in the future). *Id.* at pp. 20–21. Plaintiff represents that it will use this information only to pursue its claims in this litigation. *Id.* at p. 21. This Court granted plaintiff's *ex parte* motion, concluding that plaintiff had established good cause because it could not meet its service obligation under Fed.R.Civ.P. 4 without the requested discovery. *Order*, Doc. No. 4, pp. 1–2.

On June 14, 2013, plaintiff issued a subpoena to WideOpenWest (“WOW”), seeking information attached to certain IP addresses (“the subpoenaed information”):

In accordance with the attached court order, please provide all records and information sufficient to identify the people or entities whose Internet Protocol Address (“IP Address”) are listed in Attachment A to this Subpoena including the following: personal and business names, any and all addresses, any and all telephone numbers, any and all e-mail addresses, and Media Access Control addresses (“MAC Addresses”).

Subpoena, attached to Doc. No. 5 as *Exhibit A*. The subpoena identified a response date of July 8, 2013. *Id.*

Doe No. 19 (“the moving defendant”) filed the *Motion to Quash* on July 22, 2013, seeking to quash the subpoena or, alternatively, to obtain a protective order limiting the information sought to defendant's name and address and limiting the purpose for which plaintiff may use the information. Plaintiff opposes the motion, *Plaintiff's Response*. Defendant has not filed a reply. This matter is now ripe for consideration.

II. Standard

The Federal Rules of Civil Procedure grant parties the right to “obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.” Fed.R.Civ.P. 26(b) (1). Relevance for discovery purposes is extremely broad. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir.1998). However, “district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.” *Surles ex rel. Johnson v.*

Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir.2007) (citing Fed.R.Civ.P. 26(b)(2)). In determining the proper scope of discovery, a district court balances a party's “right to discovery with the need to prevent ‘fishing expeditions.’” *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 907 (6th Cir.2009) (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir.1998)).

*4 Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a nonparty to, *inter alia*, produce documents. Fed.R.Civ.P. 45(a)(1). Rule 45 further provides that “the issuing court must quash or modify a subpoena that ... requires disclosure of privileged or other protected matter, if no exception or waiver applies; or subjects a person to undue burden.” Fed.R.Civ.P. 45(c)(3)(A)(iii), (iv). Although irrelevance or overbreadth are not specifically listed under Rule 45 as a basis for quashing a subpoena, courts “have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26.” *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (citations and quotations omitted). The movant bears the burden of persuading the court that a subpoena should be quashed. *See, e.g., Baumgardner v. La. Binding Serv., Inc.*, No. 1:11-cv-794, 2013 U.S. Dist. LEXIS 27494, at *4, 2013 WL 765574 (S.D. Ohio Feb. 28, 2013); *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 U.S. Dist. LEXIS 122796, at *21, 2010 WL 4513818 (S.D. Ohio Nov. 2, 2010).

III. Discussion

The moving defendant argues that the subpoena should be quashed because it requires disclosure of protected information, subjects the moving defendant to an undue burden, seeks irrelevant information, and poses a risk of extortion. Each argument will be discussed in turn.

The moving defendant argues that the subpoena should be quashed because the subpoenaed information is not relevant to this action. *Motion to Quash*, pp. 1, 3, 6. Specifically, the moving defendant argues that the subpoenaed information is not relevant because the identity of the IP subscriber does not provide the “identity of the infringer” and plaintiff is unable to link the moving defendant to the alleged infringing activity. *Id.* Defendant's argument is premised on the notion that the “subpoena should not have been issued in the first place.” *Id.* at p. 6. This argument is not well taken.

As noted *supra*, the Court previously concluded that plaintiff's request for expedited discovery was supported by good cause. *Order*, Doc. No. 4 (citing *Arista Records, LLC v. Does 1-15*, No. 2:07-cv-450, 2007 WL 5254326, at *2 (S.D. Ohio May 17, 2007)). See also *Breaking Glass Pictures v. Does 1-99*, No. 2:13-cv-389, 2013 U.S. Dist. LEXIS 88090 (S.D. Ohio June 24, 2013) (finding good cause and permitting expedited discovery in a copyright infringement case in order to obtain the identity of each Doe defendant). To the extent that defendant asks the Court to revisit this conclusion, he has offered nothing to establish that the prior decision was erroneous. For example, defendant argues at length that the mere identification of the subscriber does not necessarily establish that the subscriber was the person who allegedly downloaded the copyrighted work. See *Motion to Quash*, pp. 3-6 (arguing, *inter alia*, that a hacker, open wireless network, malicious computer software, an individual spoofing an IP address, or a third party could have downloaded the copyrighted work and that "there may or may not be a correlation between the individual subscriber, the IP address, and the infringing activity"). However, nothing in Rule 45 permits a court to quash a subpoena based on "a general denial of liability." See, e.g., *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241, 250 (N.D. Ill. 2011). See also Fed.R.Civ.P. 45. Instead, arguments related to the merits of the allegations are appropriately addressed in the context of a motion to dismiss or a motion for summary judgment, rather than on a motion to quash. See, e.g., *First Time Videos, LLC*, 276 F.R.D. at 250.

*5 The subpoenaed information is also relevant because, as this Court previously concluded, plaintiff cannot meet its service obligation under Fed.R.Civ.P. 4 without the requested discovery. *Order*, Doc. No. 4, pp. 1-2. Moreover, Rule 26 authorizes broad discovery, including discovery that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Therefore, even if discovery later reveals that a person other than the subscriber violated plaintiff's copyright, the subpoenaed information (the subscriber's contact information) is nevertheless reasonably calculated to lead to the discovery of admissible information, *i.e.*, the identity of the actual infringer.

The moving defendant also argues that the subpoena should be quashed "because it seeks disclosure of personal identification information considered to be confidential

and over which [defendant] has personal and proprietary interests." *Motion to Quash*, pp. 2, 5. The moving defendant's conclusory argument does not, however, explain how disclosure of his or her name, address, telephone number, e-mail address, and MAC address would harm the moving defendant or otherwise invade his or her privacy. See *Breaking Glass Pictures v. Does 1-283*, No. 3:13-cv-75, 2013 U.S. Dist. LEXIS 83225, at *5 (E.D. Tenn. June 13, 2013); *Sojo Prods., Inc. v. Does 1-67*, Nos. 3:12-cv-599, 3:12-cv600; 3:12-cv-601, 3:12-cv-602, 3:12-cv-603, 2013 U.S. Dist. LEXIS 58602, at *5-6 (E.D. Tenn. Apr. 24, 2013). In particular, the moving defendant has not articulated a reasonable expectation of privacy in light of the fact that he or she has already shared that information with the ISP in order to obtain internet service. See *Safety Point Prods., LLC v. Does 1-57*, No. 3:12-cv-601, 2013 U.S. Dist. LEXIS 49521, at *4-5, 2013 WL 1398585 (E.D. Tenn. Apr. 5, 2013); *Sojo Prods., Inc.*, 2013 U.S. Dist. LEXIS 58602 at *5-6. Cf. *Breaking Glass Pictures*, 2013 U.S. Dist. LEXIS 83225 at *5 (concluding that requested information is neither privileged nor protected because defendants already shared the information with the ISP).

The moving defendant further argues that the subpoena subjects the moving defendant to "undue burden." *Motion to Quash*, p. 1. See also *id.* at p. 4 ("Given the nature of the allegations and the material in question, should this Court force Wide Open West to turn over the requested information, [defendant] would suffer a reputational injury."). In response, plaintiff argues that the moving defendant lacks standing in this regard because the moving defendant "was not served with [the] subpoena or required to act or produce any information." *Plaintiff's Response*, p. 7.

Rule 45 requires that the party issuing the subpoena "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed.R.Civ.P. 45(c)(1) (emphasis added). Cf. *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) ("[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.") (quoting *Surles ex rel. Johnson*, 474 F.3d at 305). This Court has previously held that only the entity responding to the subpoena has standing to challenge the subpoena on the basis of undue burden. See *Levitin v. Nationwide Mut. Ins. Co.*, 2:12-cv-34, 2012 U.S. Dist. LEXIS 177738, at *14-

15, 2012 WL 6552814 (S.D. Ohio Dec. 14, 2012) ("Here, the subpoenas are directed to Plaintiff's prior employers. Thus, only Plaintiff's prior employers have standing to challenge the subpoenas on the ground that production of the subpoenaed documents would pose an undue burden expense."). See also *McNaughton-McKay, Elec. Co. v. Linamar Corp.*, No. 09-cv-11165, 2010 U.S. Dist. LEXIS 59275, at *9-10, 2010 WL 2560047 (E.D. Mich. June 15, 2010) ("Defendant [which was not the recipient of the subpoena] does not have standing to argue that Chrysler's compliance with the subpoena will cause undue burden where Chrysler has not objected to the subpoena on this ground."); *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) ("The party to whom the subpoena is directed is the only party with standing to oppose it.").

*6 In the case presently before the Court, the moving defendant is not required to respond to the subpoena; WOW is the responding party. WOW has not moved to quash the subpoena, nor has it even suggested that responding to the subpoena will impose an undue burden on it. Moreover, plaintiff's representation that WOW has already produced subpoenaed information regarding other Doe defendants is uncontroverted. See *Plaintiff's Response*, pp. 7-8 ("In fact Wide Open West has not only represented that it will respond to the subpoenas after giving its customers thirty days' notice, it has actually responded by providing the information for other "Doe" Defendants."). Under these circumstances, the moving defendant has not established that the subpoena imposes an undue burden or that the moving defendant has standing to challenge the subpoena on the basis of undue burden.

Finally, the moving defendant contends that BitTorrent copyright infringement cases such as this present a risk of extortion by the "use discovery to extort settlements from anonymous defendants who wish to avoid the embarrassment of being publicly associated with this type of allegation." *Motion to Quash*, p. 6 (citing *VPR Internationale v. Does 1-1017*, No. 11-2068, 2011 U.S. Dist. LEXIS 64656, 2011 WL 8179128 (C.D. Ill. Apr. 29, 2011)). However, other than these generalized fears, the moving defendant has offered no evidence (or even allegation) that the plaintiff in this action has engaged in abusive litigation tactics. On this record, this Court declines to impute such guilt to plaintiff or to preclud the pursuit of this action at this stage. See, e.g., *Malibu*

Media, LLC v. John Does 1-5, 285 F.R.D. 273, 278 (S.D.N.Y. 2012) ("[N]one of the instances of improper litigation tactics that have been brought to our attention involve plaintiff or plaintiff's counsel. We are reluctant to prevent plaintiff from proceeding with its case based only on a 'guilt-by-association' rationale."). The Court also notes that, unlike the allegations of illegal downloads in other actions addressing coercive settlements, cf. *id.*, this litigation does not, apparently, involve the alleged downloading of pornography. Moreover, even if this case did present a risk of public embarrassment, the Doe defendants may take measures to protect themselves. See, e.g., *Malibu Media, LLC v. John Does 1-14*, 902 F.Supp.2d 690 (E.D. Penn. 2012) (granting motions to proceed anonymously). Additionally, should any Doe defendant establish that plaintiff's claims have been vexatiously pursued or are frivolous, or if any Doe defendant prevails, that party may seek sanctions and/or reimbursement for his or her costs and fees. See Fed.R.Civ.P. 11; 28 U.S.C. § 1927; 17 U.S.C. § 505; Fed.R.Civ.P. 54. For all these reasons, the moving defendant's argument to quash the subpoena based on a generalized fear of extortion is not well taken.

In short, the moving defendant's request to quash the subpoena lacks merit.

*7 The moving defendant also seeks a protective order limiting the subpoena to only those documents that identify each Doe defendant by name and address and to require plaintiff "to keep this information confidential until further order of this Court, or the Plaintiff files a complaint against Doe No. 19." *Motion to Quash*, p. 7. The moving defendant argues that the other information sought by the subpoena, i.e., telephone numbers, e-mail addresses, and MAC addresses, is "not relevant for the sole purposes of identifying a defendant and serving a Summons." *Id.*

Defendant's request for a protective order is essentially a request to modify a subpoena under Rule 45 based on the purported irrelevance of the information sought by the subpoena. As discussed *supra*, however, plaintiff has established the relevance of the information sought and good cause exists to issue the subpoena. Furthermore, in granting plaintiff's motion for expedited discovery, the Court ordered that "any information disclosed to plaintiff in response to the Rule 45 subpoenas ... be used by plaintiff solely for the purpose of protecting plaintiff's rights under

the Copyright Act.” *Order*, Doc. No. 4, p. 2. The moving defendant has not articulated a reason to further limit plaintiff’s use of the subpoenaed information, nor has the moving defendant explained why the Court’s prior order is insufficient. Finally, even if the moving defendant’s request is construed as a request for a protective order under Rule 26, the moving defendant has not articulated specific facts showing a clearly defined and serious injury resulting from the discovery sought, *see Nix v. Sword*, 11 F. App’x 498, 500 (6th Cir.2001) (“To show good cause, a movant for a protective order must articulate specific facts showing ‘clearly defined and serious injury’ resulting from the discovery sought and cannot rely on mere conclusory statements.”) (quoting *Avirgan v. Hull*, 118 F.R.D. 252,

254 (D.D.C.1987) (internal quotation marks omitted)), and the moving defendant has not certified that he or she “has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action.” Fed.R.Civ.P. 26(c)(1). The moving defendant’s request for a protective order is therefore without merit.

Accordingly, defendant Doe No. 19’s *Motion to Quash*, Doc. No. 5, is **DENIED**.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4805022

Footnotes

- 1 “That value acts as a ‘unique digital fingerprint’ that ensures a piece of data belongs in a particular torrent file.” *Malibu Media, LLC v. Pelizzo*, No. 12–22768–CIV–SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 180980, at *4, 2012 WL 6680387 (S.D.Fla. Dec. 20, 2012) (citations omitted).

2013 WL 4046404
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio,
Eastern Division.

The THOMPSONS FILM, LLC, Plaintiff,
v.
DOES 1-44, Defendants.

No. 1:13 CV 595.
|
Aug. 8, 2013.

Attorneys and Law Firms

Yousef M. Faroniya, Columbus, OH, for Plaintiff.

Elizabeth J. Schuller, UAW Legal Services Plan, Defiance,
OH, for Defendants.

MEMORANDUM OPINION AND ORDER

DONALD C. NUGENT, District Judge.

*1 This matter is before the Court on the “Motion to Quash Subpoena Relating to Defendant “John Doe” With Computer Internet Protocol (“IP”) Address 74.5.150.147 Pursuant to F.R.C.P. 45 9(c); Motion to Dismiss Complaint Against “John Doe” 74.5.150.147.” (ECF # 12). Plaintiffs’ filed an Opposition to the Motion to Quash. (ECF # 13). The Motion in essence seeks to prevent the disclosure of the personal identity of the “John Doe” associated with IP Address 74.5.150.147. The only grounds cited in support of the motion to quash is that the person associated with this IP Address has a “personal right and privacy interest to his own identity and to whom his identity will, or will not, be disclosed.”

Generally, parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. Fed. R. Civ. Pro. 26(b)(1). Discovery may involve “any person,” whether or not that person is identified in the Complaint. Fed. R. Civ. Pro. 30(a)(1). The general standard for a motion to quash. Fed. R. Civ. Pro. 45(c)(3), states that a court must quash or modify a subpoena that:

(I) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business ...

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

The party seeking to quash a subpoena has the burden of demonstrating that it meets these requirements. *See Pacific Century Int’l Ltd. V. Does 1-37*, —F.Supp.2d —, 282 F.R.D. 189, 2012 WL 1072312, at *2 (N.D.Ill. March 30, 2012). There are no allegations in this instance that the subpoena requires compliance within an unreasonable time, or that they would require extensive travel by a third-party to the litigation. Further, there has been no showing that the requested depositions would subject anyone to any undue burden. Therefore, only the issue of privilege remains.

A person’s identity is not privileged or protected in the face of accusations of copyright infringement. Although individuals may have a First Amendment right to engage in anonymous speech on the internet, these protections do not extend to shield the identity of persons involved in (or accused of involvement in) copyright infringement. *Hard Drive Productions v. Does 1-48*, 2012 WL 2196038, at *4 (N.D.Ill.) (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir.2010)). Accordingly, the right of anonymity does not create a protection or privilege sufficient to satisfy the requirements for a motion to quash when raised to prevent a plaintiff from accessing the protections afforded to it by law. *Id* at *4; *First time Video LLC v. Doe*, 276 F.R.D. 241, 248 (N.D.Ill.2011); *Voltage Pictures, LLC v. Does 1-5,000*, 818 F. Supp.2d 28, 36 (D.D.C.2011). Further, because internet subscribers have necessarily conveyed their identity and other identifying information to and ISP provider in order to establish an account, they do not have a “reasonable expectation of privacy in their subscriber information.” *Hard Drive Productions* at *4 (quoting *First time Video* at 294); *see also Boy Racer, Inc. v. Does 1-34*, No. 11-23035, 2012 WL 1535703, at *4 (S.D.Fla. May 1, 2012). Finally, the Complaint sufficiently alleges the person associated with the above-referenced IP address is guilty of copyright infringement, and protestations of innocence have no

affect on Plaintiff right to engage in the requested discovery.

IT IS SO ORDERED.

All Citations

*2 For all of the above reasons, the motion to quash is DENIED.

Not Reported in F.Supp.2d, 2013 WL 4046404

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

596 F.Supp.2d 128
United States District Court,
District of Columbia.

Lawrence SINCLAIR, Plaintiff,
v.
TUBESOCKTEDD, et al., Defendants.

Civil Action No. 08-0434 (JDB).

|
Feb. 10, 2009.

Synopsis

Background: Plaintiff, who posted video on video-sharing internet website, brought action against three anonymous internet users, alleging defamation and reckless misrepresentation related to responses users made to video. Plaintiff subpoenaed internet companies to compel information regarding true identities of users, and companies filed motions to quash.

Holdings: The District Court, John D. Bates, J., held that:

[1] court lacked subject-matter and diversity jurisdiction over action;

[2] plaintiff failed to establish grounds for personal jurisdiction over defendants;

[3] challenged statements were not defamatory in nature; and

[4] plaintiff failed to allege either special damages or actual malice.

Subpoenas quashed.

West Headnotes (12)

[1] **Constitutional Law**

✦ Internet

First Amendment protection of the right to speak anonymously applies to speech over the internet. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**

✦ Discovery and subpoenas

Where compelled identification of speakers threatens the First Amendment right to remain anonymous, party seeking subpoena must show both proof of a compelling interest and a narrowly tailored restriction serving that interest. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[3] **Federal Courts**

✦ Nominal or formal parties; real parties in interest

District Court for District of Columbia lacked subject-matter and diversity jurisdiction over cause of action for defamation and reckless misrepresentation against anonymous persons who responded to video plaintiff posted on video-sharing internet website; complaint stated only state-law causes of action, and plaintiff was a citizen of Minnesota, but citizenship of anonymous defendants was unknown.

4 Cases that cite this headnote

[4] **Federal Courts**

✦ Pleadings

Diversity action cannot be brought against Doe defendants in hopes of later discovering that the requisite diversity of citizenship actually exists.

3 Cases that cite this headnote

[5] **Federal Courts**

✦ Defamation

Plaintiff failed to establish grounds for court's personal jurisdiction over defendants in action brought in District of Columbia for defamation and reckless misrepresentation related to responses made by anonymous internet users to video that plaintiff posted on video-sharing website; complaint did not

allege that defendants had continuous and systematic contacts with court's jurisdiction, that any defendant purposely directed activities toward or availed himself of privilege of doing business in court's jurisdiction, that cause of action arose from conduct within court's jurisdiction, or that any defendant had enough connection to court's jurisdiction to make exercise of jurisdiction reasonable.

Cases that cite this headnote

[6] **Federal Courts**

☞ Defamation

Even if plaintiff in defamation action had been located in District of Columbia, fact that defendants' anonymous statements on internet could be downloaded and viewed within District would be insufficient to establish personal jurisdiction.

Cases that cite this headnote

[7] **Libel and Slander**

☞ Imputation of falsehood, dishonesty, or fraud

Libel and Slander

☞ By others in general

Statements that plaintiff challenged in defamation action against anonymous internet users who responded to a video the plaintiff posted on a video-sharing website were less an attack on plaintiff's general character, but instead a dispute with the accuracy of a specific statement made by the plaintiff, and thus the statements were not defamatory in nature; challenged statements actually disputed whether plaintiff engaged in criminal and disreputable acts that plaintiff claimed, and statement that plaintiff was a former mental patient was merely a summary and report of information obtained from another content provider. Communications Decency Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

1 Cases that cite this headnote

[8] **Libel and Slander**

☞ Presumption as to damage;special damages

Libel and Slander

☞ Criticism and comment on public matters and publication of news

Plaintiff, who was arguably a limited-purpose public figure, failed to allege either special damages or actual malice, as required to state cause of action for defamation against anonymous internet users who responded to a video the plaintiff posted on a video-sharing website.

Cases that cite this headnote

[9] **Libel and Slander**

☞ Presumption as to damage;special damages

Under Minnesota law, special damages must be pled in defamation action unless alleged statements are defamatory per se.

Cases that cite this headnote

[10] **Libel and Slander**

☞ Criticism and comment on public matters and publication of news

Limited-purpose public figure must show actual malice to establish cause of action for defamation.

Cases that cite this headnote

[11] **Libel and Slander**

☞ Existence and Effect of Malice

Assertion that statements were made without knowing whether they were true or false is insufficient to establish the actual malice required to state claim for defamation.

Cases that cite this headnote

[12] **Libel and Slander**

☞ Privilege

When a plaintiff has not shown that a defendant could have published a defamatory statement with actual malice, the defendant may prevail on a defamation claim as a matter of law.

Cases that cite this headnote

Attorneys and Law Firms

*130 Lawrence Sinclair, Duluth, MN, Pro se.

James R. Klimaski, Klimaski & Associates, P.C., Washington, DC, Ray Beckerman, Ray Beckerman, P.C., Forest Hills, NY, for TubeSockTedD.

Paul Alan Levy, Public Citizen Litigation Group, Washington, DC, for mzmolly and DemocraticUnderground.com.

MEMORANDUM OPINION

JOHN D. BATES, District Judge.

**1 Plaintiff Lawrence Sinclair ("Sinclair") has filed this action for common law defamation and reckless misrepresentation against three defendants, who he describes as follows: "TubeSockTedD is a natural person maintaining an account with YouTube.com which contains his/her real identity" (Compl. ¶ 5); "mzmolly is a natural person maintaining an account with Demoncraticunderground.com [sic] which contains his/her real identity" (Compl. ¶ 6); and "OWNINGLIARS, is a natural person maintaining an account with Digg.com which contains his/her real identity" (Compl. ¶ 7). Sinclair then subpoenaed DemocraticUnderground.com, Digg.com and Google, Inc. (for YouTube.com) to acquire the true identities of the anonymous Internet speakers that he has sued, and motions to quash or compel are now pending with respect to those subpoenas. Although Sinclair's effort poses potentially important and complex issues relating to defamation actions against anonymous Internet speakers, and efforts to force revelation of the identities of such speakers, the pending motions, and ultimately the viability of this case as brought by Sinclair, can be resolved on somewhat narrower grounds.

BACKGROUND

In his complaint, Sinclair alleges that in January 2008 he posted a YouTube.com video alleging that in November 1999, while visiting Chicago, he met then-state senator Barack Obama and then purchased cocaine from, used cocaine with, and performed a sex act on Mr. Obama.¹ Compl. ¶ 8. Subsequently, according to Sinclair, in February 2008, the defendants each posted items on the Internet critical of him: TubeSockTedD uploaded a video to YouTube.com stating that Sinclair is "Spreading Lies about Obama" (Compl. ¶ 9); mzmolly posted a comment on DemocraticUnderground.com stating that Sinclair is a mental patient who was institutionalized on the date in 1999 when he claims to have encountered Obama (Compl. ¶ 10); and OWNINGLIARS posted a comment on Digg.com stating, *inter alia*, that Sinclair is a liar and was in a mental hospital when he claimed he met Obama (Compl. ¶ 11). The complaint asserts claims for defamation and "reckless misrepresentation" against each defendant, seeking \$1 million in damages on each of six counts.

The case was originally assigned to another judge of this Court, who granted Sinclair's ex parte motion for leave to engage in ex parte limited discovery, which permitted third-party subpoenas to the relevant Internet providers for account information relating to each defendant. Now before the Court are Sinclair's motion to compel information identifying defendant mzmolly, and motions to quash the subpoenas seeking from Google, Inc. and Digg.com information identifying defendants TubeSockTedD, OWNINGLIARS, and mzmolly.² The case was reassigned to the undersigned judge in July 2008. Thereafter, in an Order issued on August 14, 2008, the Court denied Sinclair's motion seeking relief under 18 U.S.C. § 3771 against the Department of Justice and directed that the Clerk accept no further filings from Sinclair's then-counsel, Montgomery Blair Sibley, who had been suspended from the practice of law.

DISCUSSION

**2 This case involves Sinclair's effort to identify and obtain monetary relief from three bloggers who have criticized him concerning his sensational claims,

which were broadly publicized in the “blogosphere,” in tabloid newspapers, and on radio programs. The threshold issue presented—whether the Court should order the identification of the anonymous Internet speakers Sinclair has sued—is of growing importance in the law. It raises First Amendment questions uniquely framed to the message and discussion boards that are increasingly popular on the Internet, and that thrive on the ability of users to criticize and respond to criticism, often anonymously, to the audience viewing the original message. Sinclair has used that medium to communicate his original message and then to respond vigorously to those, including the three anonymous defendant bloggers, who have criticized him concerning his sensational claims.

[1] [2] Generally speaking, the First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 166–67, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Such rights to speak anonymously apply, moreover, to speech on the Internet. *See, e.g., Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092–93 (W.D.Wash.2001); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F.Supp.2d 1261, 1264–66 (C.D.Cal.2001); *ACLU v. Johnson*, 4 F.Supp.2d 1029, 1033 (D.N.M.1998); *see generally Reno v. ACLU*, 521 U.S. 844, 853, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). And the Supreme Court has required both proof of a compelling interest and a narrowly tailored restriction serving that interest where compelled identification of speakers threatens the First Amendment right to remain anonymous. *McIntyre*, 514 U.S. at 347, 115 S.Ct. 1511; *see also Bates v. City of Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) (due process requires a showing of a compelling interest where compelled disclosure threatens fundamental *132 rights). Hence, recognizing these First Amendment interests and the chilling effect that subpoenas seeking the disclosure of anonymous speakers can have on dissenters, *see, e.g., FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284–85 (11th Cir.1982), courts have applied a three-part test for a qualified privilege against disclosure of anonymous sources in the analogous area of libelous speech: the party seeking the identity of an anonymous speaker must show (1) the issue as to which disclosure of the source is sought goes to the heart of the case, (2) disclosure is necessary to prove the issue because the party seeking the information is likely to prevail on all other issues, and (3) all other

means of proving the issue have been exhausted. *Lee v. Dep't of Justice*, 413 F.3d 53, 59–60 (D.C.Cir.2005); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir.1986).

Drawing on this case law, two similar standards have emerged in cases involving discovery seeking the identification of anonymous Internet speakers. In *Dendrite Int'l v. Doe*, 342 N.J.Super. 134, 775 A.2d 756, 760–61 (N.J.Super.Ct.App.Div.2001), a five-part balancing test was articulated, requiring (1) that the plaintiff undertake to notify the anonymous posters that they are the subject of a subpoena seeking their identity; (2) that the plaintiff specify the exact statement alleged to constitute actionable speech; (3) that the court review the complaint and other information to determine whether a viable claim against the anonymous defendants is presented; (4) that the plaintiff produce sufficient evidence to support, *prima facie*, each element of its cause of action; and (5) that the court then balance the First Amendment right of anonymous speech against the strength of the plaintiff's *prima facie* claim and the need for disclosure of the anonymous defendant's identity. Several courts have adopted this test or some close variant of it. *See, e.g., Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969, 974–76 (N.D.Cal.2005); *In re Baxter*, 2001 WL 34806203, at *12 (W.D.La. Dec. 20, 2001); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712, 718–20 (Ariz.Ct.App.2007). A second, less-exacting standard foregoes an explicit balancing of interests but still requires the plaintiff to come forward with sufficient evidence to establish a *prima facie* case on all elements of a claim that are supportable without discovery. *See Doe v. Cahill*, 884 A.2d 451, 460 (Del.2005); *accord, Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695, at *4–5 (D.Ariz. July 25, 2006); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, 245–46 (2008).

**3 The Court need not resolve here the precise standard appropriate for determining whether disclosure of anonymous Internet speakers is warranted. When the viability of Sinclair's present complaint is assessed—and an examination of the sufficiency of a plaintiff's claims is an essential part of the tests under both *Dendrite* and *Cahill*—it is apparent that Sinclair should not be permitted to compel the identification of the three anonymous Internet speaker defendants. Sinclair's action is fundamentally flawed for three reasons.

[3] [4] First, it is obvious that, as presented, the Court has no subject-matter jurisdiction over Sinclair's complaint. He has alleged only state-law causes of action, and jurisdiction rests on diversity of citizenship. But the citizenship of the defendants—all anonymous “Does”—is not known. Instead, Sinclair, a citizen of Minnesota, urges that after reasonable discovery, he will establish that defendants are citizens of other states. *See* Compl. ¶ 2. The law is clear, however, that a diversity action cannot be brought against Doe defendants in hopes of later discovering *133 that the requisite diversity of citizenship actually exists. *See, e.g., Menzies v. Doe*, 194 F.3d 174 (D.C.Cir.1999) (unpublished table decision); *Howell by Goerdt v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir.1997); *Meng v. Schwartz*, 305 F.Supp.2d 49, 55–56 (D.D.C.2004); *see also* 13B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3602, at 372 (2d ed. 1984) (“the essential elements of diversity jurisdiction must be alleged in the pleadings”).

[5] [6] Second, there is likewise no basis to believe that Sinclair can establish personal jurisdiction over defendants; certainly the complaint pleads no ground for personal jurisdiction in the District of Columbia. Minimum contacts with this forum would appear lacking for either general or specific jurisdiction. Sinclair does not allege that any defendant owns property or does business in the District, and hence the “continuous and systematic” contacts needed for general jurisdiction are not present or even alleged. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). For specific jurisdiction, the defendant's contacts with the forum must be related to the controversy at hand. *Id.* at 414 n. 8, 104 S.Ct. 1868. Sinclair makes no allegation that any defendant has purposely directed activities toward or availed himself of the privilege of doing business in the District of Columbia, that his cause of action arises from conduct here, or that any defendant has enough connection to the District to make the exercise of jurisdiction reasonable, thereby making defendant's contacts sufficient to provide fair warning of being subject to suit here. *See id.* at 414, 104 S.Ct. 1868. Sinclair's anticipated response that defendants' statements posted on the Internet can be downloaded and viewed in the District of Columbia is insufficient to establish personal jurisdiction, even if Sinclair were located here rather than in Minnesota. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511–12 (D.C.Cir.2002).

**4 [7] Third, for several reasons, the Court questions the sufficiency of Sinclair's claims in this case. Of course, just stating that someone is “spreading lies” or is a liar may not be actionable as defamation. *See Rocker Mgmt. LLC v. John Does 1–20*, 2003 WL 22149380, at *1, *3 (N.D.Cal. May 29, 2003); *Beatty v. Ellings*, 285 Minn. 293, 173 N.W.2d 12, 17 (1969). Here, the challenged statements are less an attack on Sinclair's general character and instead a dispute with the accuracy of a specific statement made by him. Indeed, the irony here is that defendants' alleged statements actually dispute whether Sinclair engaged in the criminal and disreputable acts that he has claimed, hardly the normal fare of a defamatory statement. The statement that Sinclair is a former mental patient, although perhaps defamatory, is most probably not actionable because mzmolly and OWNINGLIARS were simply summarizing and reporting information obtained from another content provider. *See* 47 U.S.C. § 230(c)(1).

[8] [9] [10] [11] [12] Perhaps most importantly here, Sinclair has not alleged in his complaint either special damages or actual malice. Under Minnesota law, special damages must be pled unless the alleged statements are defamatory per se, which they are not here. *See Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn.1977). Arguably, Sinclair is a limited-purpose public figure concerning the controversy that he sought to generate relating to candidate Obama and the 2008 presidential election, *see Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296–97 (D.C.Cir.1980), and *134 hence he must show actual malice. Not only has Sinclair failed to plead actual malice, which condemns his defamation claim, but there is no reason whatsoever to believe he will be able to show by the requisite clear and convincing evidence that defendants' Internet statements were made with the degree of serious doubts about their truth that the actual malice standard requires. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The assertion by Sinclair that statements were made without knowing whether they were true or false, *see* Compl. ¶ 25, is plainly insufficient to establish actual malice. *St. Amant*, 390 U.S. at 731–32, 88 S.Ct. 1323. And when a plaintiff has not shown that a defendant could have published a defamatory statement with actual malice, the defendant may prevail on a defamation claim as a matter of law. *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C.Cir.1988).

If the Court were to engage in the balancing required under the *Dendrite* standard, certainly Sinclair's discovery attempts to compel disclosure of the identity of the three anonymous Internet speaker defendants would have to be rejected. Likewise, under the *Cahill* test, Sinclair plainly fails to establish a prima facie case on his claims or that his complaint can survive its obvious jurisdictional flaws, and hence his attempt to discover defendants' identities must be rejected. Where the viability of a plaintiff's case is so seriously deficient, there is simply no basis to overcome the considerable First Amendment interest in anonymous speech on the Internet. Sinclair has provided no ground to do so here.³

****5** Finally, the Court returns to the question of subject-matter jurisdiction. Clearly, there is a total absence of subject-matter jurisdiction in this Court as revealed on the face of the complaint. Sinclair offers no convincing argument to the contrary. Federal jurisdiction based on diversity of citizenship cannot simply be assumed, as

Sinclair wishes, with discovery then permitted in hopes that a proper basis for jurisdiction can later be ascertained. The proper course in a setting like this one is for a plaintiff to pursue any valid claims in a state court where both subject-matter and personal jurisdiction exist. Hence, the Court will dismiss Sinclair's action in this Court for a clear lack of subject-matter jurisdiction.⁴

CONCLUSION

For the foregoing reasons, Sinclair's discovery effort to compel disclosure of the identities of the three anonymous Internet speaker defendants is rejected and the complaint will be dismissed. A separate Order has been issued on this date.

All Citations

596 F.Supp.2d 128, 2009 WL 320408

Footnotes

- 1 Because Sinclair's allegations, and hence this action, are totally unrelated to President Obama's current official responsibilities, the Court will not employ that title in this opinion.
- 2 The arguments presented by mzmolly and DemocraticUnderground.com in opposition to Sinclair's motion to compel have, for the most part, simply been adopted in the context of the motions to quash. The Court will therefore refer collectively to defendants' arguments unless further specificity is needed.
- 3 Sinclair's responsive arguments do not squarely address the serious issues here. His ad hominem accusation against mzmolly and its counsel (Public Citizen) is baseless, and the contention that only a jury can assess the facial validity of his claims ignores the body of defamation law discussed above. So, too, the argument that the First Amendment is irrelevant ignores both logic and the law. And the contention that jurisdiction can be established later through discovery is unpersuasive. Lastly, Sinclair's effort to force Public Citizen to reveal the identity of its client is frivolous because no subpoena has been served on Public Citizen and Sinclair simply ignores the attorney-client privilege.
- 4 Although the Court is not impressed with the merits of Sinclair's claims, and rejects completely his discovery efforts, the sanctions requested by mzmolly and DemocraticUnderground.com will be denied given the evolving and novel areas of law involved here.

2010 WL 816647

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

A.Z. (a minor) and B.Z. (on behalf of
A.Z. as parent), Plaintiffs–Appellants,

v.

John DOE and Jane Doe, Defendants–Respondents.

Argued Nov. 9, 2009.

|

Decided March 8, 2010.

West KeySummary

1 Libel and Slander

☞ Truth as justification in general

The trial judge erred when he held that student established a prima facie case of defamation against an anonymous individual who e-mailed school officials photographs of a student allegedly breaking the law by engaging in underage drinking. All of the photographs of her with alcoholic beverages, in conjunction with student's failure to present any certification of her own, or from any other witnesses, that she was not consuming alcoholic beverages on the occasion that was depicted in the original photograph supported the truth of the allegations.

Cases that cite this headnote

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L–6469–08.

Attorneys and Law Firms

Carl J. Soranno argued the cause for appellants (Brach Eichler, L.L.C., attorneys; Mr. Soranno of counsel; Mr. Soranno and Bobby Kasolas, on the briefs).

Shifra Apter argued the cause for respondents (Hartman & Winnicki, P.C., attorneys; Richard L. Ravin, of counsel; Mr. Ravin and Ms. Apter, on the brief).

Before Judges LISA, BAXTER & ALVAREZ.

Opinion

PER CURIAM.

*1 Plaintiff A.Z. appeals from a Law Division order that quashed a subpoena she issued to an Internet Service Provider to learn the identity of the person who sent an anonymous email that allegedly defamed her. Relying on *Dendrite International, Inc. v. John Doe, No. 3*, 342 N.J.Super. 134, 775 A.2d 756 (App.Div.2001), which imposes a considerable barrier to discovering the identity of a person who anonymously posts defamatory material on the Internet, the trial judge quashed the subpoena.

In *Dendrite*, we held that where an anonymous person posted defamatory speech on broadly-available Internet message boards, a plaintiff would be entitled to an order divulging the identity of the anonymous author only if the plaintiff: provides sufficient information to demonstrate that his or her cause of action could withstand a motion to dismiss for failure to state a claim, supported by prima facie evidence to support each element of such cause of action (third prong); and establishes, through a balancing test, that the necessity for the disclosure of the anonymous defendant's identity outweighs the defendant's First Amendment right of anonymous free speech (fourth prong). *Id.* at 141–42, 775 A.2d 756.

The judge concluded plaintiff had established that her cause of action for defamation could withstand a motion to dismiss for failure to state a claim upon which relief can be granted, *Rule* 4:6–2(e), and that plaintiff had produced prima facie evidence supporting each element of her cause of action, as required by *Dendrite's* third prong, *Dendrite, supra*, 342 N.J.Super. at 141, 775 A.2d 756. Nonetheless, the judge granted Doe's motion to quash the subpoena because, applying the balancing test set forth in *Dendrite's* fourth prong, *id.* at 142, 775 A.2d 756, he concluded that Doe's cause of action suffered from so many weaknesses that disclosure of Doe's identity was unwarranted when balanced against Doe's First Amendment right of anonymous free speech.

Plaintiff's principal claim on appeal is that the judge's application of the *Dendrite* fourth prong balancing test was flawed, thereby requiring reversal. We do not reach that claim because we are satisfied, based upon our de novo review of the record, that the judge erred when he concluded that plaintiff had established a prima facie cause of action for defamation. That failure of proof entitled Doe to an order quashing plaintiff's subpoena. We thus affirm the order that so provided, but do so upon different grounds from those expressed by the trial judge.

I.

Plaintiff A.Z.¹ was a high school student, and was a member of the school's "Heroes & Cool Kids" program. The club was comprised of students of high academic achievement, who pledged to maintain standards of exemplary personal conduct.

On May 29, 2008, Dominick Gliatta, the faculty adviser, received an anonymous email signed "A concerned parent."² Referencing the "Heroes & Cool Kids" club, the writer stated:

Dear Mr. Gliatta[,]

*2 I am, well, a concerned parent. I wish not to have my or my child's identity known.

My child has informed me about a Heroes and Cool Kids program at school. I am aware of the prestige honor [sic] of being a member. I am also aware of the contract that each member has signed. However, I would like to inform you that several [sic] of your Heroes and Cool Kids are infact [sic] breaking their contracts, and breaking the law. Attached are a few pictures taken by the students themselves. All are found on www.facebook.com and open to the public.

I support the Heroes and Cool Kids program. But I think the name and focus of the group should be maintained by all members.

Sincerely,

A concerned parent

The email concluded with a list of the names of seven students who were depicted in the photographs attached to the email, of whom plaintiff was one.

Of the nine attached www.facebook.com³ photographs, only one showed plaintiff. It depicted her standing at a ping pong table about to throw a ping pong ball. On the table in front of her are several red plastic disposable beverage cups and approximately seven beer cans. The photograph of plaintiff bore a file name of A.[]Z.[].jpg. From the information in the record, it is impossible to determine who posted the photograph on Facebook. Unlike the photograph of plaintiff, which did not depict her expressly engaging in any illegal activity, the other eight photos depicted students holding beer cans or bottles of alcohol, holding a beer funnel, or appearing to inhale some form of illicit drug.

Upon receipt, Gliatta forwarded the email and attachments to the school principal. Ultimately, the email was disseminated to the school superintendent and to two local police departments. The school and police department investigated the circumstances depicted in the photographs and chose not to prosecute plaintiff.

On August 26, 2008, plaintiff filed a complaint alleging defamation, and named as defendant only the anonymous author, whom she designated as John Doe and Jane Doe. To discover the identity of the anonymous author of the email, plaintiff sought, and obtained, an order to reveal Doe's identity. Google notified plaintiff that the email in question was sent from an IP address assigned to Cablevision, which meant that defendant Doe's Internet service provider was Optimum Online. Optimum Online notified its customer that it had been ordered to reveal his or her identify, whereupon defendant Doe moved to quash the subpoena.

In support of her motion to quash the subpoena, Doe relied on *Dendrite*, *supra*, and asserted that anonymous speech is protected by the First Amendment, and that the email in question had not defamed plaintiff because it merely expressed the author's opinion and did not expressly accuse plaintiff of any violation of law. Doe also argued that the email sent to Gliatta was accurate, because by engaging in underage consumption of alcohol, plaintiff had indeed broken the law and had violated her Heroes and Cool Kids contract.

*3 In opposition to Doe's motion, plaintiff argued that she had established a prima facie case of defamation and that her interest in obtaining Doe's identity outweighed any First Amendment concerns Doe had advanced. Plaintiff further maintained that *Dendrite* was distinguishable because it dealt with an Internet message board, rather than an email sent only to one person.

In a written opinion, although the judge ultimately concluded that plaintiff had provided sufficient evidence to establish a prima facie case of defamation, he commented that it was a "difficult question." The judge was troubled by "the absence of any certification or affidavit from plaintiff asserting that she has not engaged in underage drinking." Consequently, according to the judge, "there is no evidence that the statement is false." The judge nonetheless found that plaintiff had presented sufficient evidence to establish a prima facie case of defamation. The judge reasoned:

Evaluating the entire content of the e-mail, the natural inference is that the photographs serve as factual support for the written e-mail. Allegedly they show minors partaking in underage drinking. However, the photograph of the plaintiff does not show her drinking. Rather it shows her holding a ping pong ball appearing to be in the act of throwing it. On the ping pong table are some plastic cups. There is nothing in the photograph which would clearly and distinctly indicate that the plaintiff was drinking alcoholic beverages. Nonetheless, the [c]ourt is cognizant, as expressed by both parties, that this could be a depiction of plaintiff taking part in a drinking game. While the statement could very well turn out to be true and therefore, not defamatory, plaintiff argues that the photograph and e-mail accuse the plaintiff of ... [violating] *N.J.S.A. 2C:33-15* which makes it a misdemeanor for someone under the legal age to consume alcoholic beverages. The e-mail lists plaintiff's name along with the other students depicted in

the photographs. It is, therefore, not unreasonable to infer that the defendant is accusing the plaintiff of engaging in underage drinking. The [c]ourt concludes for the purpose of evaluating the third prong that there is sufficient evidence to support the cause of action on a prima facie basis.

Turning to the fourth *Dendrite* prong, *id.* at 142, 775 A.2d 756, the judge concluded that plaintiff failed to establish that the strength of her prima facie case and the necessity for disclosure outweighed Doe's First Amendment right to anonymous free speech. For that reason, the judge concluded that plaintiff was not entitled to an order disclosing Doe's identity.

In applying the fourth *Dendrite* prong, the judge identified what he perceived as weaknesses in plaintiff's case that caused Doe's interests to outweigh plaintiff's: plaintiff had made no statement that the e-mail was false; the e-mail did not specify that plaintiff had engaged in underage drinking; Doe's e-mail could be considered not a defamatory statement, but rather an opinion sent to the guidance counselor running the program that "the Heroes and Cool Kids program is not working"; Doe sent the e-mail only to the guidance counselor and not to the public at large, creating an issue as to whether plaintiff was entitled to damages for harm to her reputation; because plaintiff could be characterized as a limited public figure, by reason of her involvement in the Heroes and Cool Kids Program, an elevated standard of proof was applicable and she had not satisfied it; and the doctrine upon which plaintiff relied, slander per se, was a "tort law relic" held in disrepute. The judge's ruling was memorialized in a written order of February 24, 2009. The judge denied plaintiff's ensuing motion for reconsideration. Her appeal is before us on an interlocutory basis by leave granted.

*4 On appeal, plaintiff argues the trial court erred because this case does not involve publication in a public forum, but rather a direct private telecommunication, and therefore *Dendrite* does not apply. She also maintains that if *Dendrite* does apply, the judge's application of *Dendrite*'s fourth prong constitutes reversible error. Doe urges us to affirm the order under review, contending that the *Dendrite* standard applies and the trial judge applied it properly. As a threshold matter, Doe also argues before

us, as she did in the trial court, that plaintiff failed to make out a prima facie case of defamation.

II.

We owe no deference to the judge's legal conclusions; our review is de novo. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995).

We turn first to the judge's conclusion that plaintiff had produced prima facie evidence supporting each element of her cause of action for defamation, as required by *Dendrite's* third prong. Doe contends that because the information contained in his or her e-mail was true, plaintiff's defamation claim must fail. Plaintiff, on the other hand, contends that because Doe included plaintiff's photograph, in which plaintiff was doing nothing unlawful or illegal, and placed that photograph among a group of photographs of seven other students engaging in the use of narcotics and in underage drinking, Doe had falsely accused plaintiff of engaging in the same unlawful or illegal behavior as the others. Plaintiff maintains that the e-mail and photographs are "a false and defamatory attack upon [her] reputation and image since the statements made by [Doe] were false and ... injured [her] reputation."

"A defamatory statement is one that is false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others." *Romaine v. Kallinger*, 109 N.J. 282, 289, 537 A.2d 284 (1988) (quoting *Leers v. Green*, 24 N.J. 239, 251, 131 A.2d 781 (1957)). To establish a prima facie case of defamation, a plaintiff must present proof tending to establish each of the following elements: 1) defendant made a defamatory statement of fact about the plaintiff; 2) the statement was false; 3) the statement was communicated to a third party; and 4) defendant made the statement while either knowing that it was false, or while failing to exercise due care to ascertain the truth or falsity of the statement. *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585, 969 A.2d 1097 (2009).

Turning to the first element of defamation, we are satisfied that the e-mail, which listed plaintiff's name among the students who allegedly were "breaking their contracts, and breaking the law" is defamatory. Such statement

unquestionably has the capacity to injure plaintiff's reputation or subject her to the "loss of the good will and confidence" in which she is held by others. *Romaine*, *supra*, 109 N.J. at 289, 537 A.2d 284. Additionally, the remarks in question are a statement of fact, and not an immune expression of opinion, because they " 'suggest[] specific factual assertions that could be proven true or false.' " *Leang*, *supra*, 198 N.J. at 585, 969 A.2d 1097 (quoting *DeAngelis v. Hill*, 180 N.J. 1, 14, 847 A.2d 1261 (2004)). Thus, we are satisfied that plaintiff presented prima facie proof satisfying the first element of a cause of action for defamation because the statements in the e-mail constituted a statement of fact that had the capacity to injure plaintiff's reputation.

*5 We turn to the second *Leang* factor, which requires prima facie evidence that the statement was false. "A truthful statement will not support a cause of action based on defamation, and the truth of the statement is an absolute defense to a claim of defamation." *G.D. v. Kenny*, 411 N.J. Super. 176, 187, 984 A.2d 921 (App.Div.2009). "True statements are absolutely protected under the First Amendment." *Ward v. Zelickovsky*, 136 N.J. 516, 530, 643 A.2d 972 (1994). Significantly, "[a] statement can be 'fairly accurate' and still be considered the truth as a defense to a defamation claim ." *G.D.*, *supra*, 411 N.J. Super. at 193, 984 A.2d 921 (quoting *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 407, 733 A.2d 516 (App.Div.), *certif. denied*, 162 N.J. 488, 744 A.2d 1211 (1999)). Thus, to satisfy her obligation of presenting prima facie proof to satisfy the second prong of *Leang*, plaintiff must demonstrate that Doe's accusation that she was "breaking [her] contract[], and breaking the law" was false.

Although the judge recognized that plaintiff had presented "no evidence that the statement is false," the judge nonetheless concluded that plaintiff had presented sufficient evidence of each element of a cause of action for defamation. To the extent that the judge concluded that plaintiff had presented prima facie evidence that Doe's statement was false, such conclusion was faulty for several reasons.

First, as the judge recognized, plaintiff has never submitted any proof that Doe's statement was false.⁴ For example, she has never provided a sworn statement that she was not consuming alcohol while underage, that the photograph was a forgery, that the photograph had been altered, or that she was not the person who was depicted

in the photograph Doe sent to Gliatta. Nor did plaintiff submit an affidavit from any of the other teenagers at the party stating that plaintiff did not consume any of the alcoholic beverages that are shown in the photographs.

Second, although plaintiff argues that the two police departments that investigated Doe's allegation of underage drinking determined that plaintiff had not engaged in such conduct, plaintiff has presented no proof of any such conclusion by law enforcement. Her own statement to that effect is clearly hearsay, which is not competent evidence. *See N.J.R.E.* 801(c), 802.

Third, even if police did not decide to charge plaintiff with underage drinking, as plaintiff claims, we reject plaintiff's argument that a decision by law enforcement authorities not to charge her with a violation of *N.J.S.A.* 2C:33-15⁵ establishes the falsity of Doe's allegation that she engaged in underage drinking. Unquestionably, law enforcement authorities are afforded broad discretion in deciding whether to initiate a prosecution. *State v. Kraft*, 265 *N.J.Super.* 106, 111, 625 A.2d 579 (App.Div.1993). Thus, law enforcement's decision to refrain from charging plaintiff with a violation of *N.J.S.A.* 2C:33-15 does not establish that plaintiff was innocent of engaging in underage drinking. It merely establishes that for whatever reason, police chose not to charge her.

*6 Fourth, the photograph of plaintiff that Doe attached to her e-mail appears to corroborate Doe's statement that plaintiff was "breaking the law." As we have noted, *N.J.S.A.* 2C:33-15 makes it a violation of law for a person under the age of twenty-one to consume or possess an alcoholic beverage. While the photograph does not depict plaintiff consuming alcohol, a reasonable interpretation of the photograph demonstrates that plaintiff was in possession of the beer stacked on the ping pong table next to her.

A person possesses an item if he "knowingly procured or received the [item] possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." *N.J.S.A.* 2C:2-1(c). While plaintiff was not in actual possession of the beer because she did not have physical or manual control of it, *State v. Spivey*, 179 *N.J.* 229, 236, 844 A.2d 512 (2004), her proximity to the beer and her presence at a party where beer and other alcoholic beverages were being consumed by high school students is consistent with her ability to

exercise immediate control and dominion over the beer, which would establish constructive possession of an item she was prohibited by law from possessing. *See State v. Schmidt*, 110 *N.J.* 258, 268, 540 A.2d 1256 (1988). That being so, plaintiff cannot demonstrate the falsity of Doe's statement that plaintiff was "breaking the law."

Fifth, and perhaps most compelling, are the additional photographs Doe submitted in support of his or her motion to quash the subpoena. As Doe explained in the certification that he/she filed in support of the motion, Doe had seen several other photographs of plaintiff on www.facebook.com, all of which showed plaintiff "holding and drinking alcoholic beverages." Doe certified that he/she "had seen pictures like these prior to sending the e-mail. It is obvious to anyone looking at these photos that [plaintiff] is consuming alcohol with her friends, and therefore, because of her age (under 21 years of age), is breaking the law."

The photographs in question, which Doe attached to her certification in support of her motion to quash the subpoena, show plaintiff: holding a bottle of Corona Light beer in her hand; holding a bottle of Corona Light beer up to, and touching her mouth; in the act of twisting off the cap on a bottle of Smirnoff Vodka; holding a mixed drink in each hand; and standing next to friends while holding a beverage cup in one hand, while the friend holds the bottle of Smirnoff Vodka against plaintiff's abdomen. All of these photos were uploaded to the www.facebook.com website either by plaintiff or by her sister.

Although the judge chose not to consider these additional photographs when he decided Doe's motion to quash the subpoena, they are part of the record on appeal, as they were filed with the trial court and are contained in Doe's appendix. Plaintiff has never sought to suppress them or in any other way remove them from our consideration. Each of these additional photos was in existence, and had been viewed by Doe, before he/she sent his/her e-mail to Gliatta. These additional photographs make it abundantly clear that if there was any doubt about the truth of Doe's assertion that plaintiff was "breaking [her] contract[,], and breaking the law," these additional photographs lay any such doubt to rest.

*7 Thus, we consider all of the photographs in conjunction with plaintiff's failure to present any certification of her own, or from any other witness,

certifying that she was not consuming alcoholic beverages on the occasion that is depicted in the original photograph Doe attached to the e-mail. Having done so, only one conclusion can be drawn: plaintiff has not presented prima facie proof that Doe's statement was false. To refute Doe's numerous photographs of plaintiff consuming alcoholic beverages—all of which support the truth of Doe's statement in her e-mail that plaintiff was “breaking [her] contract [, and breaking the law]”—plaintiff has presented the most tenuous and insubstantial proof imaginable, the mere fact that police chose not to charge her with underage drinking. No reasonable factfinder, when presented with plaintiff's proofs on the one hand, and Doe's on the other, could conclude that Doe's statement was false.

Therefore, we conclude the judge erred when he held that plaintiff had established a prima facie case of defamation. The only reasonable conclusion to be drawn is that Doe's statements were the truth. As we have already observed, “[a] truthful statement will not support a cause of action based on defamation, and the truth of the statement is an absolute defense to a claim of defamation.” *G.D.*, *supra*, 411 N.J.Super. at 187, 984 A.2d 921. Consequently, we reverse the Law Division's finding that plaintiff established a prima facie case of defamation.

In light of that determination, we need not decide the other arguments advanced by plaintiff, which include her claim that the judge made numerous errors of law when

he engaged in the balancing test required by *Dendrite's* fourth prong. Nor is it necessary for us to decide whether *Dendrite* should even be applied in circumstances such as this where Doe did not avail himself or herself of the form of worldwide internet communication that the defendant in *Dendrite* had used. *Dendrite, supra*, 342 N.J.Super. at 151, 775 A.2d 756.

We are satisfied that regardless of whether the balancing test embodied in *Dendrite's* fourth prong is applied or not, no plaintiff is entitled to an order unmasking an anonymous author when the statements in question cannot support a cause of action for defamation. Although the judge reached the correct result when he quashed the subpoena that would have required Optimum Online to reveal Doe's identity, we disagree with his reasoning. Nonetheless, we are satisfied that, because plaintiff cannot establish that Doe's statements were false, plaintiff has not established a prima facie cause of action for defamation and is therefore not entitled to learn Doe's identity. We thus affirm the order quashing the subpoena.⁶

Affirmed.

All Citations

Not Reported in A.2d, 2010 WL 816647

Footnotes

- 1 A.Z.'s mother, B.Z., is also named as a plaintiff on behalf of her minor daughter. All further references in this opinion to plaintiff shall signify A.Z.
- 2 The e-mail address that was displayed was registered with Google's e-mail service.
- 3 Facebook is a social networking Internet website on which users routinely post photographs of themselves.
- 4 Although plaintiff's complaint alleged falsity, we note that the complaint was not a verified complaint and was therefore not signed by plaintiff.
- 5 N.J.S.A. 2C:33–15(a) provides that any person who “knowingly possesses” or “knowingly consumes” an alcoholic beverage when under the legal age to purchase alcoholic beverages is guilty of a disorderly persons offense.
- 6 See *Isko v. Planning Bd. of Twp. of Livingston*, 51 N.J. 162, 175, 238 A.2d 457 (1968) (holding that an order or judgment will be affirmed on appeal if it is correct, even though the court gave the wrong reasons for it).

IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

**DONALD R. SWARTZ and
TERRY KELLER SWARTZ,**

Plaintiffs,

v.

**JOHN DOE #1, JOHN DOE #2, and
JOHN DOE #3,**

Defendants.

)
)
)
)
)
)
)
)
)
)
)

2009 OCT -8 PM 2: 30

RICHARD R. ROOKER, CLERK

L. Stottor D.C.

Case No. 08C-431

MEMORANDUM AND ORDER

Before the Court is Defendant John Doe #1's Motion to Dismiss and Plaintiffs' request for a review of Defendant's Motion to Quash Subpoena and for Protective Order. The Court notes that a temporary protective order was orally granted at the hearing on March 13, 2009, pending the disposition of the Motion to Dismiss; however, no written Order was ever submitted by Defendant.

As detailed further in the Memorandum portion of this Order, the Motion to Dismiss is GRANTED in part and DENIED in part. Plaintiffs' request to discover the identity of John Doe #1 is GRANTED and Defendant's request for a protective order is DENIED. The Court additionally GRANTS Defendant's oral Rule 9 motion and recommends that the Court of Appeals consider the matter to provide guidance to other Tennessee courts facing similar issues.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Donald R. and Terry Keller Swartz, husband and wife, are residents of Old Hickory, Tennessee, located in Davidson County. Plaintiffs have engaged in various business

activities, including the restoring and selling of real property and the operation of recovery facilities for recovering substance abusers.¹ Defendant John Doe #1 is the author of a blog entitled "Stop Swartz," located at <http://stopswartz.blogspot.com>, that contained statements critical of Plaintiffs.² In their original Complaint filed February 11, 2008, Plaintiffs alleged that several of the posts on the Stop Swartz blog contain defamatory statements and invasions of their privacy. Plaintiffs also made claims of defamation and violation of privacy against two other anonymous defendants.³

After filing this action, Plaintiffs had the Circuit Court Clerk's Office issue subpoenas in blank. One of those subpoenas was issued to Google, Inc., the parent company of the Blogger hosting service used by the Stop Swartz blog, on August 28, 2008. Plaintiffs sought the name and address of the blog author and the identifying information of two separate email addresses, stopswartz@gmail.com and ohvnasucks@gmail.com.⁴ Plaintiffs made no apparent attempt to communicate with the blog author via those email addresses or by using the comment feature on the blog. After receiving the subpoena, Google notified Defendant John Doe #1 through email. Counsel for John Doe #1 then made a special appearance and moved to quash the subpoena and for a protective order barring further discovery by Plaintiffs regarding the identity of John Doe #1.

Defendant John Doe #1's Motion to Quash and for Protective Order was heard on March 13, 2009. During the hearing, counsel for John Doe #1 indicated that if the Motion to Quash was not granted, he intended to file a Motion to Dismiss. After hearing argument from both parties,

1 Amended Complaint ¶ 1.

2 Because the defendants have been identified as John Does, the Court will refer to them in with masculine pronouns. The Court makes no finding as to whether the defendants are male or female.

3 John Doe #2 is alleged to have provided information and defamatory statements to John Doe #1. John Doe #3 is alleged to have published statements on the website Craigslist.org that were defamatory and violated Plaintiffs' privacy.

4 In addition to owning and operating the blog hosting service in question, Google, Inc. also owns and operates the Gmail web-based email service used by the blog author.

this Court determined that further inquiry was necessary to evaluate the matter and indicated to the parties that the Court would follow the analysis contained in the New Jersey case *Dendrite International, Inc. v. Doe*.⁵ The Court declined to grant the Motion to Quash, but orally granted a Temporary Protective Order pending further hearing. The Court also granted Plaintiffs' oral motion for leave to amend their Complaint and ordered Defendant to file his Motion to Dismiss within thirty (30) days of the filing of the Amended Complaint. The parties were instructed to present limited proof at that hearing in order for the Court to evaluate the claims as part of the *Dendrite* analysis.

John Doe #1's Motion to Dismiss was heard on August 25, 2009, along with argument and proof regarding Plaintiffs' ability to discover the identity of John Doe #1. Although the Court had permitted Defendant to file a sworn affidavit under a pseudonym, counsel for Defendant presented no proof. Donald and Terry Keller Swartz both presented live testimony at the hearing.

II. MOTION TO DISMISS

The Court must first determine whether Defendant John Doe #1 is entitled to dismissal before considering whether to allow Plaintiffs to discover his identity. Defendant argues that he is not subject to the personal jurisdiction of this Court. Defendant further argues that there is no evidence that the alleged acts occurred in Davidson County.

The Court finds that it does have personal jurisdiction over Defendant. At least one of the blog posts read by defense counsel at the hearing indicated that Defendant owned a home in Old Hickory, Tennessee, and that he had resided there for some time. Even if Defendant were not a resident of Old Hickory or Davidson County, he has availed himself of the jurisdiction through the blog. The Stop Swartz blog was a hyper-local blog focused solely on topics of concern to

⁵ *Dendrite International, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

residents of Old Hickory, Tennessee, and its effect were felt exclusively by Old Hickory residents.⁶ It is true that the mere availability of a web page in a particular jurisdiction does not subject the author of that web page to personal jurisdiction.⁷ However, the nature of the Stop Swartz blog was much more focused and interactive than a simple web page. Defendant solicited information through the blog regarding a shopping center fire and the whereabouts and activities of the Plaintiffs. Defendant John Doe #1 is therefore subject to the personal jurisdiction of this Court.

Defendant has argued under Tennessee Rule of Civil Procedure 12.02(6) that Plaintiffs have failed to state a claim upon which relief may be granted. The Court finds that Plaintiffs have failed to state a claim of defamation as to John Doe #1's statements regarding the listing of property on MLS.⁸ Whether Plaintiffs list the properties they sell on certain real estate listings is a matter of fact and is not defamatory. However, Plaintiffs have adequately plead all other claims contained in the Amended Complaint to support a claim for which relief may be granted.

Defendant's Motion to Dismiss is therefore GRANTED as to the defamation claim contained in Paragraph 11 of the Amended Complaint, but is DENIED as to the rest of Plaintiffs' claims.

III. MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

The Court must now determine whether Plaintiffs are entitled to discover the identity of the John Doe defendants in order to pursue their remaining claims. After hearing arguments for Defendant's Motion to Quash Subpoena and for Protective Order, the Court indicated to the parties that it would conduct the First Amendment inquiry according to the *Dendrite* analysis.

⁶ See *Calder v. Jones*, 465 U.S. 783 (1984).

⁷ See *Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y.1996); *Zippo Mfr. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

⁸ Amended Complaint ¶ 11.

This Court granted a protective order protecting the identity of John Doe #1 pending the resolution of the Motion to Dismiss. Several months have passed since that hearing, and the Court now revisits the question of what standard should be applied to balance the First Amendment interests of John Doe #1 with the defamation and privacy concerns of Plaintiffs.

As an initial matter, the Court recognizes that anonymous speech is entitled to First Amendment protection.⁹ Anonymous speech has played a significant role in literary, cultural, and political discourse throughout history.¹⁰ Likewise, the democratic nature of the internet has rendered online speech significant in modern public discourse by “allowing more and diverse people to engage in public debate.”¹¹ Anonymous speech is a particularly important component of internet speech.¹² Speech on the internet, whether made under a real name or anonymously, is subject to full First Amendment protection.¹³ The U.S. Supreme Court has also found that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”¹⁴

However, just as other forms of speech are limited by defamation or privacy considerations, internet anonymous speech is not entitled to absolute protection.¹⁵ The free speech interests of the Defendant must therefore be balanced with the reputation and privacy

9 See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

10 *McIntyre*, 514 U.S. at 341-42.

11 *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005).

12 *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (“Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas . . .”). See generally Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. L. REV. 1157 (2006).

13 *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d at 1097 ([T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”).

14 *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

15 *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances [are not] within the area of constitutionally protected speech . . .”). See also *In re Subpoena Duces Tecu to America Online, Inc.*, 2000 WL 1210372, at *6 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom, American Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) (“Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.”).

interests of the Plaintiffs. This appears to be a case of first impression in Tennessee. The Court is not aware of any reported Tennessee case that addresses the issue of defamation and online anonymity.¹⁶ It is therefore the task of this Court to determine what standard should be applied, and whether Plaintiffs are entitled to discover the identity of the anonymous defendants under that standard.

While no Tennessee court has previously visited this question, several state and federal courts have developed various standards that offer some guidance.¹⁷ Courts have generally applied more protective tests to expressive speech cases than to intellectual property infringement cases.¹⁸ Because John Doe #1's online statements are expressive speech, a higher-burden standard is more appropriate to properly balance Defendant's free speech interests.

Among the weakest of the standards applied to expressive speech is that employed in the case *In re Subpoena Duces Tecum to America Online, Inc.* The Circuit Court of Virginia merely required that a plaintiff have a "legitimate, good faith basis" for the cause of action before allowing discovery of identifying information.¹⁹ Some courts have applied a standard that is supposed to be equal to that of a motion to dismiss.²⁰ However, other courts have rejected the "motion to dismiss" standard as "potentially confusing because of the variations in the motion to

16 At least one other trial level court has grappled with some of these issues. The Shelby County Chancery Court heard arguments in a similar blogging case, but Plaintiffs voluntarily dismissed the case without prejudice. See *City of Memphis, Tennessee v. John and/or Jane Does 1-30*, No. CH-08-0965 (2008), available at <http://www.citizen.org/litigation/briefs/IntFreeSpch/cases/articles.cfm?ID=14267#memphis> (last visited Sep. 19, 2009).

17 One particularly high-profile case was recently decided by the Supreme Court of the State of New York. *In the Matter of the Application of Liskula Cohen*, No. 100012/09, (N.Y. Sup. Ct. Aug. 17, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen%27s%20Petition.pdf> (last visited Sep. 18, 2009). However, because that case relied principally on New York State case law, it holds less persuasive power than other recent online defamation cases.

18 See generally Ashley I. Kissinger & Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, 26 COMM. LAW. 4, 5-8 (2009) (discussing the various free speech balancing tests applied to different forms of speech by different courts).

19 *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 at *8 (2000). See also *Alvis Coating, Inc. v. John Does One Through Ten*, 2004 WL 2904405 (W.D.N.C. 2004) (apparently requiring nothing more than an allegation of libel).

20 *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999); *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (D. Wis. 2006).

dismiss standard in different jurisdictions.”²¹ Several courts have required a showing of proof sufficient to defeat a motion for summary judgment before a defendant's anonymity may be pierced.²²

A growing number of courts have begun to follow the standard established in *Dendrite International, Inc. v. John Doe No. 3*.²³ This test requires a substantial showing of proof, but avoids labels such as “summary judgment standard” in order to avoid confusion. The *Dendrite* test uses a five-step analysis to determine whether a plaintiff is entitled to discover the identity of an anonymous defendant.²⁴ First, a plaintiff must attempt to notify an anonymous online defendant that he or she is the subject of a subpoena or application for order of disclosure. Second, a plaintiff must give the defendant a reasonable time to file opposition to the application. Third, a plaintiff must identify the exact statements purportedly made by each anonymous online defendant that give rise to each claim. Fourth, a plaintiff must make a *prima facie* or substantial showing of proof for each element of each cause of action. If a plaintiff has successfully complied with the first four requirements and the court concludes that a substantial showing of proof has been made, the fifth and final step is for the court to balance the First Amendment interests of the anonymous defendant against the strength of the plaintiff's *prima facie* case and the need for disclosure to allow the claims to proceed.²⁵

21 *Doe I v. Individuals*, 201 F. Supp. 2d 249, 255 (D. Conn. 2008). See also *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008).

22 See *Doe v. Cahill*, 884 A.2d at 458-61; *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. 2007); *Best W. Int'l*, 2006 WL 2091695 at *4 (D. Ariz. 2006).

23 See *Independent Newspapers, Inc.*, 966 A.2d 432, 456 (Md. 2008); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005).

24 Some cases following *Dendrite* purport to use a four-step analysis, combining the first two requirements of notice and adequate time to respond. See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008). While the two requirements may be considered together, they are separate steps in the *Dendrite* analysis.

25 *Dendrite Int'l Inc.*, 775 A.2d at 760-61. The court in *Cahill* held that this final balancing step was unnecessary because defamation law or the summary judgment standard already balanced these competing rights. However, this approach was criticized in *Moblisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007). Most courts continue to include the final balancing step, and this Court holds that it necessary to adequately consider the First Amendment interests.

The Court concludes that the *Dendrite* test is the best method of determining whether a plaintiff is entitled to pierce a defendant's shield of anonymity. The Court further finds that this factual showing must be made by affidavit, deposition, or sworn statement, and that mere allegations of fact are insufficient.²⁶ As the *Solers* and *Krinsky* courts have noted, the labels of "summary judgment" or even "*prima facie*" are potentially confusing. By adopting the *Dendrite* analysis, the Court does not focus on the terminology, but rather the requirement that a plaintiff make a substantial legal and factual showing that the claims have merit before permitting discovery of an anonymous defendant's identity.

IV. APPLICATION OF DENDRITE ANALYSIS

A. Adequate Notice

Due to the anonymity of the online speakers, Plaintiffs were unable to serve any of the John Doe defendants at the time this action was commenced. However, John Doe #1 did receive notice of the subpoena through Google Legal Support, a division of the parent company Google, which provided the hosting service. That notice provided the case name and number, as well as the contact information for Plaintiff's counsel.²⁷ The Google Legal Support notice also indicated that Google would comply with the subpoena unless it received a copy of a Motion to Quash before September 18, 2008.²⁸ John Doe #1 made a timely special appearance to quash the subpoena and to protect disclosure of his identity. The Court finds that the notice provided through Google was sufficient notice to enable John Doe #1 to challenge the request for pre-service discovery.

²⁶ The failure of the Maryland Court of Appeals in *Independent Newspapers, Inc. v. Brodie* to specify how a plaintiff should make a *prima facie* showing of his or her claims was criticized in a recent opinion by the Court of Appeals for the District of Columbia. *Solers v. Doe*, No. 07-CV-159 (D.C. Ct. App. August 13, 2009).

Plaintiffs chose to present their proof through testimony under oath at the hearing and accompanying exhibits.

²⁷ Defendant's Motion to Quash Subpoena and for Protective Order, Exhibit A.

²⁸ *Id.*

B. Time to Respond

Plaintiffs issued subpoenas to Google in September of 2008, and did not take any further action until John Doe #1 responded with his Motion to Quash in February 2009. The Court finds that Defendant was afforded sufficient time to respond to the subpoena.

C. Stating Claims with Specificity

The Court finds that, with the exception of the defamation claim arising out of the statement regarding MLS property listings, Plaintiffs have met the third requirement by stating their claims with specificity so that relief may be granted. The Amended Complaint identifies the specific statements that Plaintiffs allege as defamatory and in violation of their privacy.

D. Substantial Showing of Proof

1. Defamation Claims

In order to meet the factual showing requirement of the fourth prong of the *Dendrite* analysis, both Terry Keller Swartz and Donald Swartz presented testimony at the hearing and were subject to cross-examination by counsel for Defendant. A defamation claim in Tennessee requires a plaintiff to prove “that: 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.”²⁹ Plaintiffs submitted and displayed several copies of the blog posts in question, and testified that the statements were publicly available for several months.³⁰ Plaintiffs testified that the allegations of arson, improper management of rehabilitation facilities, exploitation of recovering substance abusers, inferior construction work, negative effect on home prices, and being “run out of East

²⁹ *Sullivan v. Baptist Memorial Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (citing *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1972)).

³⁰ The statements at issue are no longer available because the author of the Stop Swartz blog removed much of the content after this action was commenced.

Nashville” are all false.³¹ Plaintiffs also testified that they experienced actual damages from the allegedly defamatory statements, including loss of business, harm to their reputations, emotional distress, and the costs of having to hire a security expert inspect their home.

John Doe #1 argues that Plaintiffs had made themselves public figures through their political advocacy against certain elected officials and their involvement in the Old Hickory community. However, Plaintiff's actions were not sufficient to render them public figures, nor were their actions or whereabouts public issues.³² The Court finds that Plaintiffs have made a substantial showing of proof to support their allegations that John Doe #1 acted recklessly or negligently by publishing statements that were false and defamatory.

2. Invasion of Privacy Claims

In order to prevail in a claim for invasion of privacy, a plaintiff must show that a defendant has intruded, physically or otherwise, upon the solitude or seclusion of the plaintiff or his or her private concerns, and that the invasion would be highly offensive to a reasonable person.³³ Plaintiffs testified that John Doe #1 invaded their privacy by publishing information on their activities and whereabouts, and encouraging others to do the same. Plaintiff Terry Keller Swartz also testified that John Doe #1 republished a statement made on Craigslist.com by John Doe #3 disclosing that “Terry Keller [Swartz] is an ex-addict.”³⁴ The Court finds that Plaintiffs have made sufficient showing that these statements intruded on Plaintiff's private concerns, and that a reasonable person would find those intrusions highly offensive.

³¹ Amended Complaint ¶ 12.

³² See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

³³ *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 411 (Tenn. 2002) (citing *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 211 (Tenn. Ct. App. 2001)).

³⁴ See Amended Complaint ¶ 13.

The Court finds that Plaintiffs have made a substantial legal and factual showing through sworn testimony and exhibits that their defamation and invasion of privacy claims have merit, thus satisfying the fourth prong of the *Dendrite* analysis.

E. Balancing Proof with Interests of the Speaker

Having found Plaintiffs' claims to be meritorious, the fifth and final step in the *Dendrite* analysis requires the Court to balance the strength of Plaintiffs' claims against the First Amendment concerns of Defendant. As guidance, the Court looks to the standard set forth in Justice Powell's concurrence in the U.S. Supreme Court case *Branzburg v. Hayes*, as well as the Tennessee Shield Law.³⁵ The Court determines that the relevant factors include: the specificity, relevance, and materiality of the discovery request; the absence of alternative means to obtain the requested information; and the extent and reasonableness of the speaker's privacy expectations.

The information sought by Plaintiffs is stated with specificity; Plaintiffs seek John Doe #1's name and address. This information is indisputably relevant and material to their claims. There is no other apparent method to obtain the information sought in the subpoena to Google. John Doe #1 had some expectation of privacy, having published his statements under a pseudonym on an anonymous blog. However, Defendant would have had notice that his personal information would be made available under certain circumstances. All users of the Blogger hosting service must agree to the Blogger Terms of Service and Privacy Notice.³⁶ The Blogger Privacy Notice in turn references the Google Privacy Policy.³⁷ The Google Privacy Policy in effect during the relevant time period states in relevant part, "We have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to . . . satisfy

³⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (J. Powell, concurring); T.C.A. § 24-1-208(c)(2). The *Brodie* and *Dendrite* courts have been criticized for failing to enumerate the factors used in the final balancing step of the *Dendrite* analysis. See Kent A. Lambert, *Online Identities Unmasked*, LITIG. NEWS, Summer 2009, at 11.

³⁶ Blogger Terms of Service, <http://www.blogger.com/terms.g> (last visited Sep. 17, 2009).

³⁷ Blogger Privacy Notice, April 9, 2007, <http://www.blogger.com/privacy> (last visited Sep. 17, 2009).

any applicable law, regulation, legal process or enforceable governmental request."³⁸ Defendant has not cited any countervailing reasons to warrant a higher level of protection.

V. CONCLUSION

As previously stated, Defendant's Motion to Dismiss is therefore GRANTED as to the defamation claim contained in Paragraph 11 of the Amended Complaint, but is DENIED as to the rest of Plaintiffs' claims.

The Court further finds that Plaintiffs have made a sufficient showing of their claims to outweigh John Doe #1's free speech interests. Defendant's Motion to Quash and for Protective Order is therefore DENIED, and Plaintiffs are entitled to discover the identity and personal information of John Doe #1.

The Court additionally finds that this issue is an appropriate one for interlocutory review. Appellate court review would prevent irreparable injury, prevent needless and protracted litigation, and facilitate the development of a uniform body of law.³⁹ Defendant John Doe #1's oral request for interlocutory appeal is therefore GRANTED.

It is so ORDERED.

Entered this ____ day of October, 2009.


THOMAS W. BROTHERS, JUDGE

³⁸ Google Privacy Center, *Archive: Privacy Policy Version 10/14/2005*, http://www.google.com/privacy_archive_2005.html (last visited Sep. 17, 2009) (in effect from Oct. 14, 2005, until Aug. 7, 2008).

³⁹ Tenn. R. App. P. 9(a).

Copy

CERTIFICATE OF SERVICE

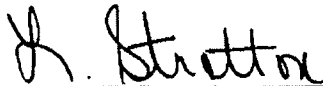
I hereby certify that a copy of the above has been mailed to:

Charles E. Sizemore
213 Fifth Ave. N
Suite 300
Nashville, TN 37219

Stephen E. Graubeger
2323 N. Mt. Juliet Rd.
Mt. Juliet, TN 37122

Google, Inc.
Attn: Google Legal Support
1600 Ampitheater Pkwy
Mountain View, CA 94043

this 8th day of October, 2009.



Deputy Clerk

2007 WL 1453491 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Allegheny County.

Reunion Industries Inc.

v.

Doe 1

No. GD06-007965.

|

March 5, 2007

Attorneys and Law Firms

*450 *Stephen J. Del Sole* and *Bryan C. Devine*, for plaintiff.

Joseph J. Schwerha IV, for defendant Doe 1.

Opinion

WETTICK, *A.J.*

Plaintiff, a publicly traded corporation, has filed a complaint raising a cause of action for commercial disparagement against three Does, based on messages posted over the Internet on the Yahoo! Financial Bulletin Board. Plaintiff seeks a court order compelling AOL to identify Doe 1.¹ Through a motion seeking a protective order, Doe 1 seeks a court order barring AOL from releasing this information on the ground that Doe 1's identity is protected from disclosure by the First Amendment of the Federal Constitution. This motion is the subject of this opinion and order of court.

In 2000, I considered a discovery request to obtain the name of an anonymous defendant who published allegedly defamatory statements on an Internet website in *Melvin v. Doe*, 149 Pitts. L.J. 12, 49 Pa. D. & C.4th 449 (2000). In the *Melvin* litigation, an unknown person published statements on a website which accused Judge Melvin of engaging in political activity that was inappropriate for a judge. She brought a defamation claim against the unknown speaker and sought to obtain the speaker's identity through discovery. The defendant obtained counsel *451 who sought a protective order that would prevent this discovery. While I rejected the defendant's contention that the First Amendment absolutely protects anonymous speech, I ruled that the defendant was protected by a qualified privilege rooted

in the First Amendment against compelled disclosure of anonymous sources in civil lawsuits and that a summary judgment standard would appropriately balance the right of one party to speak anonymously against the right of another party to protect his or her reputation.

I then gave the plaintiff the opportunity to establish a prima facie case. She produced credible evidence that would support a finding that the statement was made, the statement was false, the statement was defamatory, and she sustained actual harm. Consequently, I entered a court order permitting the plaintiff to discover the identity of John Doe.

The defendant filed an appeal to the Superior Court in which he contended that findings of impairment of reputation and standing in the community, personal humiliation, mental anguish, and suffering are an insufficient basis for compelling disclosure; he contended that I should have protected his anonymity unless the plaintiff could establish out-of-pocket monetary losses or medical treatment.

The Pennsylvania Superior Court ruled that my order denying the motion for a protective order is not a collateral order subject to immediate appeal. 789 A.2d 696 (Pa. Super. 2001). The Pennsylvania Supreme Court rejected the Superior Court's ruling and remanded the case to the Superior Court to consider the defendant's constitutional question, namely whether the First Amendment *452 requires a public official defamation plaintiff to establish a prima facie case of actual economic harm prior to obtaining discovery of an anonymous defamation defendant's identity. 575 Pa. 264, 836 A.2d 42 (2003). The appeal was withdrawn prior to any ruling by the Superior Court.

In the present case, plaintiff contends that my use of a summary judgment standard to protect anonymous speech should be limited to criticism of public officials. However, it cites no cases supporting this position that case law governing anonymous speech differentiates between criticism of public officials and other types of speech such as commercial disparagement. Also, I am not aware of any line of cases holding that commercial disparagement is less valuable speech or that it is not of equal First Amendment importance. Plaintiff has not offered and I am not aware of any justification for giving less protection, than a summary judgment standard, to

anonymous speech involving information that may affect the value of a publicly traded company.

At the time I made my rulings in *Melvin v. Doe*, the parties did not cite, and I was not aware of, any reported cases that had addressed the issue of whether the First Amendment protects the anonymity of persons who anonymously publish an allegedly defamatory statement on an Internet website. Following my ruling, two appellate court cases have addressed the same issue and have ruled that a plaintiff who cannot produce evidence supporting a prima facie case may not learn the identity of a Doe defendant.²

***453** In *Dendrite International Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), the corporation commenced a lawsuit against several John Does based on allegedly defamatory comments posted on an Internet message board. Through discovery, the plaintiff sought to compel the Internet service provider to disclose the identity of the John Doe defendants. John Doe No. 3 opposed on the ground that his right to speak anonymously was protected by the United States and New Jersey Constitutions.

The trial court ruled that both the First Amendment protections of the Federal Constitution and the New Jersey Constitution protect the anonymity of a speaker unless the party seeking to ascertain the identity of the speaker can establish a prima facie case of defamation which, for corporation defamation, requires a showing of actual damages. The trial court denied the motion of the plaintiff-corporation to compel discovery because the plaintiff-corporation had failed to offer evidence which would support a finding that the plaintiff-corporation was harmed.

The New Jersey Superior Court affirmed the ruling of the trial court that the plaintiff was not entitled to discover the identity of the anonymous speaker because of its failure to offer evidence that would support a finding of actual harm. The court ruled that the following guidelines govern discovery seeking disclosure of the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations, or businesses:

“The complaint and all information provided to the court should be carefully reviewed to determine whether ***454** plaintiff has set forth a prima facie cause of action against

the fictitiously named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

“Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.” *Id.* at 760-61.

In *Doe No. 1 v. Cahill*, 884 A.2d 451 (De. 2005), an elected council member and his wife brought a defamation action against John Doe defendants based on anonymous statements posted on an Internet weblog. Through a discovery request that was the subject of this litigation, the plaintiffs sought to learn the identity of John Doe No. 1 from Comcast, which owned John Doe No. 1's IP address. Doe sought a protective order to prevent the plaintiffs from obtaining his identity.³

The trial court, applying a good faith standard—a showing of a good faith basis upon which to bring the action and a showing that the information sought is related ***455** to the claim and cannot be obtained from any other source—denied Doe's motion for a protective order. The Delaware Supreme Court reversed on the ground that the trial court applied an incorrect standard. It held that a defamation plaintiff must satisfy a summary judgment standard before obtaining the identity of an anonymous defendant: “We, accordingly, hold that before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.” *Id.* at 460.⁴

Also see *Best Western International Inc. v. Doe*, 2006 WL 2091695 (D. Ariz. 2006), which applied a summary judgment standard.

In *Klehr Harrison Harvey Bransburg & Ellers LLP v. JPA Development Inc.*, 2006 WL 37020 (C.P. Phila. 2006), the Philadelphia Common Pleas Court concluded that

the implementation of new standards for cases involving a plaintiff's effort to learn the identity of anonymous Internet posters will likely do more harm than good. The court ruled that a balancing of John Doe's First Amendment rights against the plaintiff's rights to the information sought is built into the Commonwealth's existing civil procedure. Consequently, the defendant's motion for a protective order should be analyzed under existing Pennsylvania discovery rules.

Also see *In re Subpoena Duces Tecum to America Online Inc.*, 2000 WL 1210372 (Va. Cir. Ct. 2000), reversed *456 on other grounds, *America Online Inc. v. Anonymous Publicly Traded Company*, 542 S.E.2d 377 (2001), where a Virginia trial court applied a good faith standard to a request to learn the identity of John Doe defendants.

Upon consideration of the case law decided after my rulings in *Melvin v. Doe*, I continue to believe that a summary judgment standard is the appropriate standard for balancing the First Amendment protections of anonymous speech against interests furthered through state libel laws.

For these reasons, I am entering a court order granting Doe 1's motion for a protective order barring further

discovery to learn the identity of Doe 1. However, plaintiff may request that I rescind this court order if plaintiff is able to make a prima facie showing that (1) the statements on the bulletin board were false; (2) the publisher either intended the publication to cause pecuniary loss or reasonably should have recognized that the publication would result in pecuniary loss; and (3) pecuniary loss did, in fact, result.⁵

For these reasons, I enter the following order of court.

*457 ORDER

On March 5, 2007, upon consideration of Doe 1's motion for a protective order, it is hereby ordered that until further order of court, plaintiff is barred from obtaining from America Online Inc. any information relating to the identity of Doe 1.

All Citations

2007 WL 1453491, 80 Pa. D. & C.4th 449, 35 Media L. Rep. 1917

Footnotes

- 1 Yahoo! Inc. identified AOL as being the Internet provider for Doe 1.
- 2 I am not aware of any other appellate court case law addressing this issue.
- 3 According to footnote 4, federal law (47 U.S.C. §551(c)(2)) requires an Internet service provider to furnish notice to the Internet service subscriber before it can disclose the identity of its subscriber to a third party. *Id.* at 455 n.4.
- 4 The court rejected the additional requirement in *Dendrite* that the trial court must balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case. It stated that the summary judgment test is the balance.
- 5 A cause of action for commercial disparagement also requires a showing that the publisher either knows that the statement is false or acts in disregard of its truth or falsity. See *Pro Golf Manufacturing Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 246, 809 A.2d 243, 246 (2002). Plaintiff cannot establish this requirement without knowing the identity of the publisher. Thus, if plaintiff must meet this requirement, I would be giving absolute First Amendment protection to anonymous speech in commercial disparagement claims. For the reasons that I have discussed, this would be a balance that fails to take into consideration the interests protected through state libel law.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Doe I v. Individuals, D.Conn., June 13, 2008

2006 WL 2091695

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.

BEST WESTERN INTERNATIONAL, INC.,
a non-profit Arizona corporation, Plaintiff,

v.

John DOE, et al., Defendants.

No. CV-06-1537-PHX-DGC.

July 25, 2006.

Attorneys and Law Firms

Cynthia Ann Ricketts, Sara Kathryn Regan, Squire Sanders & Dempsey LLP, Phoenix, AZ, for Plaintiff.

Daniel Joseph McAuliffe, Snell & Wilmer LLP, Phoenix, AZ, Richard T. Mullineaux, Robert Jeffrey Lowe, Kightlinger & Gray LLP, New Albany, IN, for Defendants.

ORDER

DAVID G. CAMPBELL, District Judge.

*1 Plaintiff Best Western International, Inc. ("BWI") has filed this action against various John Doe Defendants. BWI claims that the Defendants have posted anonymous messages on an Internet site that defame BWI, breach contracts with BWI, breach fiduciary duties, reveal confidential information, infringe BWI trademarks, and constitute unfair competition. Because the Internet messages have been posted anonymously, BWI has been unable to identify the John Doe Defendants.

BWI has filed a motion to conduct accelerated and expedited discovery. Doc. # 5. The motion seeks permission to serve subpoenas on various Internet Service Providers ("ISPs") and others before an initial conference is held pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. The subpoenas seek disclosure of the identities of the sponsor for the Internet site as well as

individuals who have posted messages. BWI contends that such information is needed before the John Doe Defendants can be served with BWI's complaint and can participate in a Rule 26(f) conference. Alleging that it is suffering irreparable injury as a result of comments posted on the site, BWI seeks expedited discovery and expedited consideration of its motion to conduct the discovery. Doc. # 6.

BWI also asks the Court to issue an order requiring the preservation of evidence related to the identities of the John Doe Defendants. Doc. # 7. BWI notes that information concerning Internet users typically is retained for only a short period of time. BWI asks the Court to enter an order requiring the preservation of information until it can be obtained through discovery.

One of BWI's proposed subpoenas would be directed to H. James Dial. Mr. Dial has appeared through counsel, identified himself as one of the John Doe Defendants, and filed an opposition to BWI's motion for discovery and a counter-motion to stay all discovery until completion of a Rule 26(f) conference. Doc. # 11. BWI has filed a response. Doc. # 17.

This order will address four issues: (1) whether BWI has shown good cause to conduct discovery in advance of a Rule 26(f) conference, (2) whether this Court has jurisdiction to rule on the propriety of BWI's proposed subpoenas, (3) what showing BWI must make in order to conduct discovery that implicates First Amendment rights of the John Doe Defendants, and whether BWI has made that showing, and (4) other relevant considerations.

1. Good Cause.

Rule 26(d) provides that "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed.R.Civ.P. 26(d). The rule makes clear, however, that this limitation can be overridden by court order. *Id.* An order permitting discovery before a Rule 26(f) conference may be issued for "good cause." *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D.Ariz.2001).

BWI has satisfied the good cause requirement. BWI has established by affidavit that it is unable to identify the John Doe Defendants by means other than the subpoenas. Doc. # 9. Although Mr. Dial volunteered that he is one of the John Doe Defendants, the action is brought against an

apparently large number of individuals who have posted anonymous messages on the Internet site. The case cannot proceed and a Rule 26(f) conference cannot be held until these Defendants are identified.

*2 In addition, courts have recognized that ISPs typically retain user information for only a limited period, ranging from a few days to a few months. *UMG Recordings, Inc. v. Does I-IV*, No. 06-0652 SBA (EMC), 2006 WL1343597, at * 1 (N.D.Cal. Mar. 6, 2006). The loss of evidence seems particularly possible in this case, as the Internet site expressly states to users that “your identity will be totally and forever withheld and destroyed.” Doc. # 5, Ex. A at 2 (emphasis added).

Because the identities of the John Doe Defendants is necessary for this case to proceed and there is reason to believe that those identities may be lost if discovery is delayed, the Court concludes that BWI has established good cause to conduct discovery before the Rule 26(f) conference. This conclusion does not, however, answer the question of whether discovery should be permitted in light of the First Amendment rights of the John Doe Defendants. That issue will be addressed below.

2. The Court's Jurisdiction to Address the First Amendment Question.

BWI's proposed subpoenas to ISPs and other individuals will be issued by federal district courts in the jurisdictions where those entities and individuals reside. Because only the court issuing a subpoena generally has power to quash it, BWI argues that this Court has no jurisdiction to address the propriety of the subpoenas.

Rule 45(c) does provide that subpoenas should be enforced by the district court which issued them, but this rule “does not alter the broader concept that the district court in which an action is pending has the right and responsibility to control the broad outline of discovery.” *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C.2001). General discovery issues should receive uniform treatment throughout the litigation, regardless of where the discovery is pursued. Courts have also recognized that a party's “ ‘discovery rights [in other districts] can rise no higher than their level in the district of trial.’ ” *Id.* (quoting *Fincher v. Keller Indus., Inc.*, 129 F.R.D. 123, 125 (M.D.N.C.1990)).

The First Amendment implications of BWI's proposed discovery constitutes a significant issue in this case. Not only are the First Amendment rights of fundamental importance to the John Doe Defendants, but they also will be preserved or defeated by discovery orders. To the extent that Defendants have a First Amendment right to anonymous speech (a right addressed below), the right will be lost if BWI is permitted to learn the speakers' identities through discovery. This right will be at issue in every district where BWI's subpoenas are served. It makes little sense to leave such a central issue to district-by-district determination.

The Court concludes that it can and should address the First Amendment issues raised by BWI's discovery motion. As the court noted in *Static Control*, “[t]his issue extends well beyond the matter of a specific subpoena.” *Id.* at 434 n. 5.

3. First Amendment Considerations.

*3 BWI is a non-profit member corporation. Doc. # 3 at ¶ 9. BWI's members own and operate more than 4,000 hotels and lodging properties under the BWI name and trademark. *Id.* at ¶ 10. BWI's board of directors communicates with BWI members through regional governors who are appointed to oversee specific geographic districts. *Id.* at ¶ 11.

BWI's complaint and motions say little about the content of the Internet messages at issue in this case. Mr. Dial asserts, however, that the Internet site was created as a place for BWI members and governors to state their views on various issues concerning BWI. Specifically, Dial asserts that recent proposed changes in BWI's method of operation have drawn extensive comment on the site. The site describes itself as a “site for Best Western members,” where members and headquarters staff “can exchange information on a 100% confidential basis.” Doc. 5, Ex. A.

Several First Amendment principles are relevant.

First, the Amendment protects anonymous speech. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999). The Supreme Court has noted that “[a]nonymity is a shield from the tyranny of the majority.” *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Indeed, “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice,

but an honorable tradition of advocacy and of dissent.” *Id.*

Second, the protections of the First Amendment extend to the Internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). “Courts have recognized the Internet as a valuable forum for robust exchange and debate.” *Sony Music Entm’t, Inc. v. Does 1–40*, 326 F.Supp.2d 556, 562 (S.D.N.Y.2004). “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.” *Reno*, 521 U.S. at 870. Courts also recognize that anonymity is a particularly important component of Internet speech. “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas [...] ... the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.” *Doe v. 2 The Mart.com, Inc.*, 140 F.Supp.2d 1088, 1092, 1097 (W.D.Wash.2001).

Third, “courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.” *Sony*, 326 F.Supp.2d at 563 (citing *NAACP v. Ala. Ex Rel Patterson*, 357 U.S. 449, 462 (1958); *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir.1998); *L.A. Mem’l Coliseum, Comm’n v. Nat’l Football League*, 89 F.R.D. 489, 494–95 (C.D.Cal.1981)).

Fourth, the right to speak anonymously is not absolute. *See McIntyre*, 514 U.S. at 353; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 59, 555–56 (1985) (First Amendment does not protect copyright infringement); *Doe v. Cahill*, 884 A.2d 451, 456 (Del.2005) (“Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.”). “Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.” *In re Subpoena Duces Tecum to America On-Line, Inc.*, No. 40570, 2000 WL1210372, at *5 (Va.Cir.Ct. Jan. 31, 2000).

*4 These principles make clear that the John Doe Defendants have a First Amendment right to anonymous Internet speech, but that the right is not absolute and must be weighed against BWI’s need for discovery to redress alleged wrongs. To ensure that the First Amendment rights of anonymous Internet speakers are not lost

unnecessarily, courts typically require parties to make some showing before obtaining discovery of the speakers’ identities. Courts have recognized a range of possible showings. As the Delaware Supreme Court has explained, “an entire spectrum of ‘standards’ ... could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment and, beyond that, hurdles even more stringent.” *Cahill*, 884 A.2d at 457. BWI urges the Court to adopt the lowest standard—good faith. Dial suggests the more stringent summary judgment standard.

In deciding which standard to apply, the Court must consider the significance of the First Amendment rights at issue in this case. BWI cites several cases in which plaintiffs sued defendants for illegally downloading music from the Internet. Although the courts found that the downloading of information was entitled to some protection under the First Amendment, they recognized that downloading was not purely expressive and therefore was entitled only to “limited” First Amendment protection. *Sony*, 326 F.Supp.2d at 564; *UMG Recordings*, 2006 WL1343597 at *1 (“A person who uses the Internet to download or distribute copyrighted music without permission is engaging in the exercise of speech, but only to a limited extent[.]”).

The conduct of the John Doe Defendants, by contrast, is purely expressive. The Defendants are expressing their views on issues of interest to BWI members and governors in a forum specifically designed for an exchange of opinions and ideas anonymously. Such speech is entitled to substantial First Amendment protection.

Given the significant First Amendment interest at stake, the Court agrees with the Delaware Supreme Court in *Cahill*, and concludes that a summary judgment standard should be satisfied before BWI can discover the identities of the John Doe Defendants. The court in *Cahill* described the test in these words: “Before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must support his defamation claim with facts sufficient to defeat a summary judgment motion.” 884 A.2d at 460. This standard does not require a plaintiff to prove its case as a matter of undisputed fact, but instead to produce evidence sufficient to establish the plaintiff’s *prima facie* case:

[T]o obtain discovery of an anonymous defendant's identity under the summary judgment standard, a defamation plaintiff must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question. In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within plaintiff's control*.

*5 *Id.* at 465 (quotations and citations omitted, emphasis in original). The emphasized words "within plaintiff's control" recognize that a plaintiff at an early stage of the litigation may not possess information about the role played by particular defendants or other evidence that normally would be obtained through discovery. But a plaintiff must produce such evidence as it has to establish a *prima facie* case of the claims asserted in its complaint.

BWI's complaint provides an example of why the summary judgment standard is appropriate. The complaint alleges that Defendants have improperly posted confidential BWI information on the Internet site, wrongfully posted BWI's trademark on the site, used BWI's equipment to communicate with the site, deprived BWI of the benefits of its contract with Defendants, and made false statements regarding BWI and its business. Doc. # 3 ¶¶ 58–60, 64, 68. But BWI's complaint does not identify a single false statement allegedly made by the John Doe Defendants, identify a single item of confidential information posted on the site by Defendants, describe a single instance where BWI's mark was improperly used, explain how BWI was denied the benefits of its contracts, or explain how BWI equipment was improperly used. The complaint provides no factual support for BWI's claim that Defendants engaged in wrongful conduct not protected by the First Amendment.

At the same time, the Court finds no basis for concluding that BWI's complaint has been asserted in bad faith. Nor, given modern notice pleading standards, would BWI's complaint likely be subject to a motion to dismiss. Thus, if the standard for permitting discovery of the John Doe Defendants' identities required only good

faith or the ability to survive a motion to dismiss, BWI's proposed discovery would be permitted and the Defendants' First Amendment right to anonymous speech would be defeated. A good faith allegation of wrongdoing, devoid of factual detail, would suffice.

The Court concludes that more is needed before a defendant's First Amendment rights may be eliminated. The Court must examine facts and evidence before concluding that a defendant's constitutional rights must surrender to a plaintiff's discovery needs. The summary judgment standard will ensure that the Court receives such facts and evidence.

Other courts have adopted a multi-part test for determining when plaintiffs should be permitted to discover the identity of anonymous defendants. This test includes "(1) a concrete showing of a *prima facie* claim of actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the Doe defendants' expectation of privacy." *UMG*, 2006 WL1343597 at *1 (citing *Sony*, 326 F.Supp.2d at 564–65). The Court views the first element of this test—"a concrete showing of a *prima facie* claim"—as equivalent to the summary judgment standard. *See Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J.App.2001) ("[T]he plaintiff must produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis, prior to a court ordering the disclosure of the identity of the unnamed defendant."). The Court need not address parts (2)–(4) of this test, as they clearly have been established by BWI. The fifth part of the test—the John Doe Defendants' expectation of privacy—should be addressed in the briefing by the parties discussed below.

*6 In summary, BWI has not made a sufficient showing to justify discovery that will disclose the identities of the John Doe Defendants. BWI may be able to make such a showing in a renewed motion, but it has not done so in the present motion. The Court therefore will deny BWI's motion for expedited discovery.

4. Other Considerations.

If BWI believes that it can satisfy the summary judgment standard, it may seek to do so in a renewed motion to be filed with the Court on or before **August 18, 2006**. In the meantime, the Court will issue BWI's requested motion

regarding the preservation of documents. As noted above, there is reason to believe that the information sought by BWI will not be retained by the ISPs or others from whom BWI will seek discovery. The Court will enter BWI's proposed order to preserve such evidence. The Court notes that Mr. Dial did not oppose the entry of such an order.

BWI has asked the Court to require the host of the Internet site to post the preservation order on the site. The Court finds such a requirement unnecessary. BWI may itself make the existence of the order known through its own entry on the site. BWI may also send copies of the preservation order to those from whom it later will seek discovery if the summary judgment standard is satisfied.

If BWI attempts to satisfy the summary judgment standard, BWI should give notice to the John Doe Defendants over the Internet site and afford them an opportunity to oppose the discovery. "When First Amendment interests are at stake, we disfavor *ex parte* discovery requests that afford the Plaintiff the important form of relief that comes from unmasking an anonymous defendant." *Cahill*, 884 A.2d at 461. Therefore, "the plaintiff must undertake reasonable efforts to notify the anonymous defendant of the discovery request and must withhold action to allow the defendant an opportunity to respond." *Id.*

BWI shall notify the anticipated recipients of its discovery requests, as well as the John Doe Defendants, through entries on the Internet site and other reasonable means, that it is seeking discovery of the Defendants' identities and that the potential discovery recipients and John Doe Defendants may respond to its motion, should they choose to do so, within three weeks of the motion's filing.

Because the Court will enter BWI's requested order for preservation of documents, evidence should not be lost while these steps are undertaken. Upon receipt of any responses to BWI's renewed motion and the filing of BWI's reply, the Court will again address the question of whether discovery of the John Doe Defendants' identities should be permitted in this case.

IT IS ORDERED:

1. BWI's motion for expedited consideration of motion to conduct accelerated and expedited discovery (Doc. # 6) is **granted**.

2. BWI's motion to conduct accelerated and expedited discovery (Doc. # 5) is **denied**.

3. BWI's motion for expedited consideration of motion for order regarding preservation of documents (Doc. # 8) is **granted**.

*7 4. BWI's motion for order regarding preservation of documents (Doc. # 7) is **granted**. The Court will enter BWI's proposed order separately.

5. H. James Dial's motion to stay all discovery pending resolution of this motion and Rule 26(f) conference (Doc. # 11) is **granted** to the extent that no discovery will occur until after the Court considers BWI's renewed motion for discovery, but is **denied** to the extent that Mr. Dial seeks a stay of all discovery until a Rule 26(f) conference has occurred.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2091695