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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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LISA KRINSKY,	)	**CASE NUMBER: 1-06-CV-059796**
	)	
Plaintiff,	)	**ORDER ON DISCOVERY MOTIONS**
	)	
vs.	)	
	)	
DOE 1, et. al.,	)	
	)	
Defendants.	)	
	)	

STATEMENT OF FACTS

Plaintiff Lisa Krinsky, former President, Chairman and COO of SFBC International, Ind., is a resident of the state of Florida. SFBC is a publicly traded company. She filed suit in Florida for Intentional Interference with Contractual Relations and Defamation against Defendant Doe 6, a.k.a., Senor_Pinche_Wey, for posting allegedly defamatory statements about her on Yahoo! message boards.

The complaint alleges that Plaintiff owns 675,143 shares of SFBC. Plaintiff claims that the market value of her stock has declined by $16,000,000. ¶ 21 alleges on information and belief that the defendants are short-sellers of SFBC stock who are trying to drive down the price of the stock.

In ¶ 27, Plaintiff identifies the following statements to Senor_Pinche_Wey':comments that she considers libelous. On December 30, 2005, Senor_Pinche_Wey posted a satirical list of

a) "Jerry 'Lew' Seifer's New Year's Resolutions. . . "I will reciprocate felatoin with Lisa even though she has fat thighs, a fake medical degree, 'queefs' and has poor feminine hygiene [***sic***]."

b) "funny and rather sad that the losers who post here are supporting management consisting of boobs, losers and crooks. (Krinsky, Natan and Seifer)"

c) "Seifer a "maga [sic] scum bag"

d) "Seifer. . . . . Out"! That is one cockroach gone. . . . .how many left?"

Plaintiff argues that Senor_Pinche_Wey makes false statements that Plaintiff is a "crook" and that she has a "fake medical degree."

Senor_Pinche_Wey has appeared in the Florida action.

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In order to identify Senor_Pinche_Wey, Plaintiff served Yahoo! a subpoena seeking Senor_Pinche_Wey's account information. Senor_Pinche_Wey now moves to quash the subpoena pursuant to California Code of Civil Procedure § 1987.1.

DISCUSSION

This Court concludes that the Internet is not protected any more or any less than committed in person in the old fashioned ways. There is no qualitative difference between good old fashioned libel and internet libel. In fact, it is now easier to defame someone or manipulate the price of publicly traded stocks much easier because the Internet does not leave footprints.

Civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns. (***Sony Music Entm't Inc. v. Does 1-40*** (S.D.N.Y 2004) 326 F.Supp.2d 556, 563, ***citing, e.g., NAACP v. Alabama ex rel. Patterson*** (1958) 357 U.S. 449, 462.) "[T]here is a nonstatutory qualified immunity, grounded in the free speech and privacy provisions of the United States and California Constitutions, that limits what courts can compel through civil discovery." (***Rancho Publications v. Superior Court*** (1999) 68 Cal.App.4th 1538, 1547-1948.) The First Amendment applies to speech on the Internet. (***Reno v. ACLU*** (1997) 521 U.S. 844.) "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." (***McIntyre v. Ohio Elections Comm'n*** (1995) 514 U.S. 334, 342.) Without the cover of anonymity, some speakers may be chilled into silence. (***Rancho Publications*** 68 Cal.App.4th at 1547-1948.) The qualified privilege is decided on a case-by-case basis. (***Id.*** at 1549.) "The need for discovery is balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material." (***Id.*** at 1549.) A court must balance the right of a plaintiff to seek redress and a defendant's right to remain anonymous. (***Id.***)

In ***Rancho Publications***, the court held that the plaintiff did not demonstrate a compelling need to disclose the names of the anonymous authors of a newspaper editorial because the plaintiff did not allege that the writings were defamatory or directly relevant to the plaintiff's case. (***Id.*** at 1551.) In contrast, in the present case, Plaintiff alleges that the statements made by Senor_Pinche_Wey are defamatory and discovery of Senor_Pinche_Wey's name is necessary for her claim to proceed.

In ***Immunomedics, Inc. v. Jean Doe*** (N.J. App. Div. 2001) 775 A.2d 773, New Jersey addressed anonymous posting to a Yahoo! message board. Immunomedics alleged that messages containing confidential information were posed on a Yahoo! message board in breach of an employment contract. The court applied the test articulated in ***Dendrite Int'l v. Doe No. 3*** (N.J. Super. Ct. 2001) 342 N.J. Super. 134: the plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech" and "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."

In ***Highfields Capital Mgmt. L.P. v. Doe***, (N.D. Cal. 2004) 385 F.Supp.2d 969, 975, the court held that "when a private civil plaintiff seeks to discover the identity and address of an anonymous internet speaker" a court must apply a two part test. First, "the plaintiff must adduce competent evidence [that], if unrebutted, tend[s] to support a finding of each fact that is essential to a given cause of action. (***Id.*** at 975-976.) Second, "if, but only if, the plaintiff makes an evidentiary showing sufficient to satisfy the court in the first component of the test . . .[the court must] compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." (***Id.*** at 976.) If "the court concludes that enforcing the subpoena would cause relatively little harm to the defendant's First Amendment and privacy rights and that its issuance is necessary to enable plaintiff to protect against or remedy serious wrongs, the court would deny the motion to quash." (***Id.***) Therefore, Plaintiff must establish a prima facie case of libel before revelation of an anonymous internet speaker.

As to the substantive aspects of a case, the law of the place where the cause of action arose must be applied. Procedural matters are determined by the law of the forum. (***St. Louis-San Francisco Ry. Co. v. Superior Court of Los Angeles*** (1969) 276 Cal.App.2d 762, 766.) Plaintiff brings an action for libel in Florida State court. Therefore, whether she had made a prima facie case of libel is

evaluated under Florida law. Whether it is proper to quash a subpoena is a procedural matter to be decided under California State law.[1]

Plaintiff argues that at best the postings are mixed opinions and not protected speech. She asserts has established a prima facie case for Defamation against Senor_Pinche_Wey.

Defamation – libel and slander – is the "unprivileged publication of false statements which naturally and proximately result in injury to another." (***Byrd v. Hustler Magazine, Inc.*** (1983) 433 So. 2d 593, 595.) The elements that constitute a claim for defamation in Florida are (1) A statement of fact; (2) Defamatory effect; (3) Falsity of statement; (4) Identification of the plaintiff as the subject; (5) Publication to a third party; (6) Requisite fault by the defendant; and (7) Compensable damages to the plaintiff. (1-25 Florida Torts § 25.01.)

Plaintiff argues that Senor_Pinche_Wey's statements are libel per se. A publication is libelous per se if, when considered alone without innuendo: "(1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession." (***Richard v. Gray*** (1953) 62 So. 2d 597, 598.) At common law, words constituting libel per se were presumed, as a matter of law, to satisfy the damage and malice elements of the cause of action and, therefore, the plaintiff did not need to plead or prove these elements. (***Mid-Florida Television Corp. v. Boyles*** (1985) 467 So. 2d 282, 283.)

"[S]tatements that cannot reasonably be interpreted as stating actual facts about an individual are protected." (***Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*** (1970) 398 U.S. 6, 13.) Restricting liability to factual statements assures public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of this Nation." (***Milkovich v. Lorain Journal Co.*** (1990) 497 U.S. 1, 19.) If a statement constitutes pure opinion, the author is entitled to first amendment protection. (***Della-Donna v. Yardley*** (1987) 512 So.2d 294, 295.)

A defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of "fact." (***Horsley v. Rivera*** (11th Cir. 2002) 292 F.3d 695, 701.) Whether a statement is one of fact or opinion is a question of law for resolution by the trial or appellate court. (***Hay v. Independent Newspapers, Inc.*** (1984) 450 So.2d 293, 295.) The plaintiff in ***Horsley*** operated an anti-abortion website listing the personal information of abortion providers. After the murder of one doctor, Horsley posted the doctor's personal information and struck an "X" through the entry. During a television interview, the defendant accused Horsley of being an "accomplice to homicide." The court held that a "reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability" for the doctor's death, "not as a literal assertion that Horsley had, by his actions, committed a felony." ***Id.*** at 702. The court noted that both Horsley and the interviewer used non-literal, figurative language in expressing their views. ***Id***. The Supreme Court in ***Greenbelt Coop. Publishing Ass'n v. Bresler*** (1970) 398 U.S. 6, 13-14 held that use of the term "blackmail," to characterize the negotiating position of a developer seeking zoning variances was not libel when reported in newspaper articles because a reasonable listener would not think that a crime had been charged. In ***Old Dominion Branch No. 496 v. Austin*** (1974) 418 U.S. 264, 284 the Court held that publication of pejorative definition of scab was not actionable because use of words like "traitor" could not be construed as representations of fact.

In ***Rocker Management, LCC, v. Does 1-20*** (N.D. Cal. 2003) U.S. Dist. LEXIS 16277, the court addressed facts similar to those in this case. Rocker Management alleged "harry3866" posted libelous comments on a Yahoo! message board. The court provided examples of what Harry38666 wrote, including, "They float rumors, lies and half truths everywhere they can . . . they call the company and ask people if they are quitting. They even go so far as to threaten analyst who are bullish." "I hope and pray chohodes goes to jail. Tell him I said hello and that his raiders are losers like him. Lets get those orange jumpsuits ready." The court granted Harry3866's motion to quash on the ground that the plaintiff failed to identify statements which, read in context, would be viewed by a reasonable reader as a defamatory statement of fact.

Defendnat argues that the alleged accusation that Plaintiff has a "fake medical degree" is contained within a clearly satirical message purporting to be from Jerry Seifer. Therefore, the argument goes, read in context, no reasonable person would consider the

[1] Plaintiff argues that Senor_Pinche_Wey is forum shopping because the subpoena has not been challenged in Florida. Plaintiff is the party who chose to sue Senor_Pinche_Wey in Florida and Plaintiff has chosen to serve the subpoena on Yahoo! in California. Senor_Pinche_Wey did not choose the location of Yahoo! or the method of discovery.

statements within the fictional Seifer "resolutions" to be an assertion of fact – whether it is the implication Seifer worships Satan and a Rolls Royce, or that Plaintiff has poor hygiene and a fake degree. Nor does the Senor_Pinche_Wey's message that "management," are "boobs, losers and crooks" assert a fact that is subject to being proven true or false. "Crooks" is included with other generic, juvenile insults such as "loser." Would a reasonable person would consider the statement an assertion of a fact that Plaintiff has been arrested or convicted of a crime?[2] ***See***, Dec. of Krinsky ¶ 21.

On the one hand, Senor_Pinche_Wey's other comments, calling Seifer a scum bag and cockroach, may reinforce the understanding that Senor_Pinche_Wey's references to Plaintiff were hyperbole and insults rather than assertions of literal fact.

On the other hand, this Court believes that the issues raised by this Court in its Order dated 5 July 2006, which ordered further briefing,[3] and the totality of the circumstances of this case justifies the relief Plaintiff is seeking. The Court takes judicial notice of several federal court prosecutions involving "pump and dump" stock manipulation, and believes that Plaintiff has shown enough similarities with this case.

This Court adopts and incorporates the supplemental brief filed by Plaintiff of 24 July 2006.

CONCLUSION

Defendant Doe 6's Motion to Quash Subpoena on Yahoo! is DENIED.

DATED: 16 October 2006

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

[2] Plaintiff relies on 1934 case for the proposition that use of the word "crook" is actionable, in itself, as libel. (***Commander v. Pederson*** (1934) 156 So. 337.) Subsequent Supreme Court rulings defining the extent of the First Amendment protection of speech limited the enforceability of common law libel, undermining the holding in ***Commander***.

[2] This Court ordered briefing on whether there was issue in this case which falls under influence of ***O'Grady et al v. Superior Court Of Santa Clara County*** (23 June 2006) 139 Cal.App.4th 1423. Second, this Court asked whether any consideration should be given to whether the actions of the defendants violate any State or Federal securities laws.See 15 U.S.C. §§78J(b) AND 78ff; 18 U.S.C. §§371, 1503, 1951(a), 1962(d), 1963, 2 and 3551. See also: http://fl1.findlaw.com/news.findlaw.com/cnn/docs/fbi/uselgindy502ind.pdf, http://www.asensioexposed.com/elgindysuperseding.htm, http://www.asensioexposed.com/apverdict.pdf.

[3] This Court ordered briefing on whether there was issue in this case which falls under influence of ***O'Grady et al v. Superior Court Of Santa Clara County*** (23 June 2006) 139 Cal.App.4th 1423. Second, this Court asked whether any consideration should be given to whether the actions of the defendants violate any State or Federal securities laws.See 15 U.S.C. §§78J(b) AND 78ff; 18 U.S.C. §§371, 1503, 1951(a), 1962(d), 1963, 2 and 3551. See also: http://fl1.findlaw.com/news.findlaw.com/cnn/docs/fbi/uselgindy502ind.pdf, http://www.asensioexposed.com/elgindysuperseding.htm, http://www.asensioexposed.com/apverdict.pdf.