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ANONYMOUS POSTER ON YAHOO!,
AKA: harry3866

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROCKER MANAGEMENT LLC,

Plaintiff,

v.

JOHN DOES 1 THROUGH 20,

Defendants.

Case No. _____

U.S. District Court (D. NJ)
Case No. 02-4081 (JAP)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOVANT'S MOTION TO QUASH SUBPOENA

ORAL ARGUMENT REQUESTED

Date: May 2, 2003
Time: 9:00 a.m.
Dept.: Hon. Susan Illston

I. INTRODUCTION

Plaintiff Rocker Management LLC ("Rocker") is an investment management firm and Marc Cohodes ("Cohodes") is one of its employees. In his work for Rocker, Cohodes manages a hedge fund which invests heavily in "short" positions.[1] Cohodes identifies potential short targets by looking for companies that he believes to be engaged in criminal misrepresentations or fraudulent accounting practices. When he finds such companies, he does not merely keep his feelings to himself, but often makes his allegations public through television appearances and news interviews. A frequent target of Cohodes' criticism is the company Take-Two Interactive Software (TTWO).

As it turns out, Cohodes and Rocker are not without their critics. Some of the most vociferous of these critics can be found at the Yahoo! Finance message boards for TTWO.

In an effort to insulate itself from the very same types of criticism which it frequently dishes out, Rocker has sued 20 users of the Yahoo! Finance message boards, accusing them of unlawful restraint of trade and business libel as a result of their publicly-posted comments. The Complaint does not identify the users by their actual names, but by their "screen names" – online pseudonyms used to access certain websites and to communicate with others online. Movant is the anonymous user of the Yahoo! screen name "harry3866."

By its recent subpoena of Yahoo!, Rocker now seeks to uncover the private user information, including the identity, of the person associated with the screen name "harry 3866." Movant asks this Court to quash the subpoena because it violates his[2] First Amendment right to speak anonymously. McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). Rocker has made no showing to justify destroying this right of harry3866, but has instead relied on a conclusory Complaint as the basis for its subpoena. That Complaint alleges only that harry3866 has posted messages which

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[1] "Short selling" is a strategy by which investors borrow stock and then sell it. A subsequent drop in the stock's price allows the short seller to pay for the borrowed stock at the lower price – thereby profiting from any difference. It is thus a strategy that seeks to make money off a stock's diminishing value. Exhibit A.

[2] For convenience, Movant uses the male gender throughout this memorandum of points and authorities.

accuse Rocker of: (1) "threaten[ing] analyst[s] who are bullish" on particular stocks; (2) "spreading lies" about certain stocks; and (3) being the subject of an SEC investigation.

While Movant's comments may be acerbic, they are no more acerbic than Cohodes' own statements about TTWO and other publicly-traded companies. More importantly, Movant's comments must be viewed in context. Rodriguez v. Panayiotou, 314 F.3d 979, 986 (9th Cir. 2002). Movant did not make the statements in the Wall Street Journal or on the Nightly Business Report, but on an Internet message board – a forum where hyperbole, gossip, and irreverence flourish, and where scurrilous remarks are simply par for the course. Under such circumstances, Rocker cannot remotely establish probable cause to show that harry3866 has restrained its trade or committed business libel. As such, the First Amendment demands that Doe's right to speak anonymously be preserved.

II. STATEMENT OF FACTS

A. The Complaint

On March 17, 2003, plaintiff Rocker Management LLC, a New Jersey Corporation, filed a Complaint in the United States District Court for the District of New Jersey against Does 1 through 20. Exhibit B. Based on information and belief, the Complaint alleged two causes of action: unlawful restraint of trade and business libel. Id., ¶¶ 6-10. Specifically, the Complaint alleged that Movant and others posted "defamatory and extortionate messages concerning Rocker" and its employee Marc Cohodes on message boards maintained by Yahoo! Inc. Id., ¶ 5. According to the Complaint, some of the messages "accused Rocker and [Cohodes] of committing crimes," while others "included obscene, scatological and personally defamatory remarks." Ibid. Rocker further alleges that these messages were intended to "injure the business and business reputation of Rocker and its employees, and to coerce Rocker into a course of conduct that would cause it to lose money." Ibid.

The complaint does not identify the defendants by their true name, but by their Yahoo "screen names." Some of these names are vulgar and disparaging toward Cohodes. For instance, the screen names listed in the complaint include: "marc_cohodes_has_a_short_dick,"

"marc_cohodes_anal_warts," "marc_cohodes_butt_pirate," "marc_cohodes_gay_analist_jewboy," and "marc_chodes_ate_a_turd_sandwich." Movant uses the far less partisan screen name "harry3866." Id., ¶ 4.

On the first cause of action for unlawful restraint of trade, Rocker alleges that the defendants posted "defamatory and extortionate messages," in response to Cohodes' public comments about a stock entitled ESS Technologies (ESST). Id., ¶ 7. For instance, Rocker cites comments made by "marc_chodes_ate_a_turd_sandwich," to the effect that Cohodes manipulates stock prices and would likely be in jail within six months. Id., ¶ 8. The same poster later wrote, "Where does this cohodes guy live? I need to know," to which another responded, "I am surprised Cohodes hasn't been Killed yet." Ibid. The Complaint alleges that these comments, "standing alone or viewed in conjunction with other postings by these defendant(s)" constituted illegal threats, intended to intimidate Cohodes into changing his views about ESST. Ibid.

The Complaint does not identify any extortionate comments made by harry3866. Furthermore, according to the Documents Requested list which was attached to the Yahoo! subpoena, none of the messages attributed to harry3866 was posted on the ESST message board, but solely on other boards.

On the second cause of action for business libel, Rocker asserts that harry3866 "has posted messages accusing plaintiff of 'threaten[ing] analyst[s] who are bullish' on certain stocks and of 'spreading lies' about those stocks." Rocker later goes on to allege that Movant has accused Rocker of being the subject of an SEC investigation. Id., ¶ 10. The Complaint does not specify how Rocker has been damaged as a result of these remarks.

B. The Yahoo! subpoena

On March 20, 2003, plaintiff issued a subpoena to Yahoo! Inc. Exhibit C. The subpoena issued out of the United States District Court for the Northern District of California, but does not appear to have been approved by a district court judge or magistrate.

In the subpoena, Rocker seeks to obtain identifying information about harry3866, including his name, address, alternative screen names, and account information. In addition, the subpoena also

seeks disclosure of the name of harry3866's Internet Service Provider(s) ("ISP") through which he accesses the Internet, and of all records which may assist plaintiff in identifying that ISP.

Finally, the subpoena seeks all electronic records relating to specific postings made by harry3866 on the Yahoo! Finance bulletin board. The subpoena then goes on to identify the date, time, and message number of these postings. In all, it identifies 15 such postings, all occurring between January 12 and February 23, 2003. Of the 15 postings, 13 appeared on the TTWO message board; two appeared on the message board for "TSCM." None of the postings identified in the subpoena is alleged to have appeared on the ESST bulletin board.

On March 21, harry3866 received notice of the Yahoo! subpoena. He hereby moves to quash that subpoena on the grounds that it seeks materials and information protected by the First Amendment.

C. Yahoo! message boards

A New Jersey court accurately summarized Yahoo!'s message board service in Dendrite International, Inc. v. John Doe No. 3, 342 N.J. Super 134, 143 (App.Div. 2001), stating, "Yahoo! is an ISP that, among other things, provides a service where users may post comments on bulletin and message boards related to the financial matters of particular companies. Yahoo! maintains a message board for every publicly-traded company and permits anyone to post messages on it."

In this regard, Yahoo!'s bulletin boards are nearly identical to boards maintained by other ISPs, such as America Online, Infospace, and "Raging Bull." The message boards devoted to particular publicly-traded companies "are not sponsored by that company, or by any other company" and "no special expertise, knowledge or status is required to post a message, or to respond." Global Telemedia v. Doe, 132 F.Supp.2d 1261, 1264 (C.D.Cal. 2001). Users on these bulletin boards generally post messages anonymously, using "screen names." Dendrite, supra, 342 N.S. at 143. "Yahoo! guarantees to a certain extent that information about the identity of their individual subscribers will be kept confidential." Ibid.

Corporations and individuals can reply immediately and without cost to criticisms and other opinions posted on a message board. In this way, they may attempt to persuade readers of the

validity of their own position by presenting their own facts and opinions. Wollack decl., ¶ 5. Any responses would have the same prominence as the original message and be seen by essentially the same audience as the original criticism. Id.,.¶ 5. The message board is thus a true marketplace of ideas and a forum for disagreement.

Members of the public use the Yahoo! message boards as a source of information, opinion, and gossip about publicly-traded companies such as TTWO. There are currently more than 93,000 messages which have been posted to the TTWO message board – though it has been in existence for less than five years. See Exhibit D; Wollack decl., ¶ 8 These posts are spirited, complete with accusations and insults that, in this atmosphere, are an accepted part of the community. Id., ¶ 6. Yahoo! provides the option of reporting abusive messages, but gossip, speculation and colorful criticism are clearly common and accepted on the board. Id., ¶ 6. Furthermore, Yahoo! takes pains to remind users that the information contained in posted messages is opinion only and is not to be relied on or believed without further research. The very first message on the TTWO message board is from Yahoo!, and states:

> This is the Yahoo! Message Board about **Take-Two Interactive Software Inc (Nasdaq: TTWO)**, where you can discuss the future prospects of the company and share information about it with others. This board is not connected in any way with the company, and any messages are solely the opinion and responsibility of the poster. Exhibit D; Wollack decl., ¶ 13.

In addition, Yahoo! emblazons a similar message on literally every page of the message listings, stating:

> **Reminder:** This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose. Wollack decl., ¶ 14.

On the TTWO message board which is the subject of this case, many of the posts contain thoughtful, even scientific, analysis as to the current price of the stock and the company's prospects for future success. Other posts are light on the science and heavy on the vitriol. For instance, in a March 14, 2003 message, "sirlarrywildeman" responded to another's post by writing:

> Do you stroke your tiny, little penis while you type your garbage? I mean I think it is great that you are making some money shorting when you think it is warranted but do you really have to make such

> a jerk out of yourself in rubbing it in people's faces? Can't you just take your profit and move on?
>
> It would be one thing if you had something intelligent to say about the stock and why you think it is going lower. Instead you just say "Oh this is going down, it is a POS". Stop being such a boner and be thankful about some nice profits! (Exhibit E, p. 1.)

And still other posts are simply devoid of any cogent meaning. For instance, in a May 28, 2003 post, "menghiinox" wrote:

> The calculations are simple:
>
> TTWO investors
> = Anarchy (State of Emergency) + Crime (GTA3) + War (Conflict:Desert Storm)
> = Anarchically Criminal Militant,,
>
> TTWO short sellers
> = Order (Anti-SoE) + Security (Anti-GTA3) + Peace (Anti-CDS)
> = Orderly Secure Pacifist,,
>
> Trading TTWO is a struggle for mastery between the LIGHT side (Orderly Secure Pacifist) and the DARK side (Anarchically Criminal Militant).
> SELL TTWO NOW, if you belong to the LIGHT side.
>
> May force and profit be with you. Always. (Exhibit E, p. 2.)

Despite its occasionally sophomoric tenor, there is nothing unique about the discourse on the TTWO message board. To the contrary, Internet message boards as a whole are replete with invective, racism, and allegations of criminal misconduct aimed at corporate management, brokerage houses, and accounting firms. For example, a sampling of postings at the Yahoo! Finance message board for EBAY shows one post entitled, "Re: WHY ARE THE GOLDMAN CROOKS NOT IN JA (sic)." Exhibit F, p. 1. The post then goes on to accuse the firm of destroying e-mails that would prove them guilty of stealing "billions of dollars." Id., p. 1. Another message, posted as part of the same "thread," responds that the Goldman Sachs crooks are not in jail "BECAUSE THEY ARE ON CNBC MAKING A BULLISH CASE FOR EBAY – WHILE THEY DUMP THEIR INVENTORY." Id., p. 2. A third post, entitled "The Jews who run Goldman," asks rhetorically: "Could they be guilty of manipulation?" Id., p. 3.

Similarly, at the AOL message board, one poster accuses UBS Walberg of postponing their sell rating on Healthsouth "until their big clients could get out of the bonds." Exhibit G. A poster

on the SIRI message board, who holds himself out as a former employee of Lehman Brothers, accuses the company of manipulating SIRI's stock price. Exhibit H. At the RFMD board, one poster rails against the "Goldman-Merrill-Morgan . . . price fixing scam," and explains how the "jews at Goldman" exercise cartel control over the commodities and natural gas markets. Exhibit I.

Obviously, the giving of a few isolated examples cannot do justice to the enormous variety of mudslinging that can be found at Internet message boards. At the same time, the examples demonstrate that the TTWO board is no different than any other Internet message board – where the rules of political correctness are suspended and insults and accusations fly like golf balls at a driving range. Indeed, in comparison to many of the posts which can be found at Yahoo! Finance, the ones posted by harry3866 look like models of civility.

III. DISCUSSION

Plaintiff seeks to enforce a subpoena for information that would destroy Movant's right to speak anonymously. In this case, plaintiff can demonstrate no compelling interest why that First Amendment right should be breached.

A. Movant has a First Amendment right to speak anonymously.

The Supreme Court has held that the right to speak anonymously is protected under the First Amendment. In so holding, the Court has recognized the important historical role of anonymous writings, including the literature of Mark Twain and the advocacy of the Federalist Papers. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960). As the Court noted in Talley, "[T]he Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." 362 U.S. at 65. The Court expanded on this discussion in McIntyre, stating, "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." 514 U.S. at 341-42. The Court went on to say, "[T]he 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 342.

The Supreme Court has also recognized that communications over the Internet implicate core First Amendment values. Reno v. ACLU, 521 U.S. 844 (1997). Because of its enormous scope and its relatively low cost, the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions." Id. at 852. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages . . . the same individual can become a pamphleteer." Id. at 870. Consequently, the Court stated, "that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Ibid. As a component of free speech, the right to speak anonymously over the Internet has also been upheld by several courts. Columbia Ins. v. Seescandy.com, 185 F.R.D. 573 (N.D.Cal. 1999); ACLU v. Johnson, 4 F.Supp.2d 1029 (D.N.M. 1999), aff'd 194 F.3d 1149 (10th Cir. 1999); ACLU v. Miller, 977 F.Supp. 1228 (N.D.Ga. 1997).

B. In order to compel disclosure of the subpoenaed information, plaintiff must demonstrate a compelling need for the disclosure which supersedes Movant's right to speak anonymously on Yahoo! message boards.

A court order to compel production of an individual's identity "is subject to the closest scrutiny" when it impinges on fundamental rights. NAACP v. Alabama, 357 U.S. 449, 461 (1958); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Furthermore, the abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as the production of names. NAACP, 357 U.S. at 461. Due process therefore requires the showing of a "subordinating interest which is compelling" where disclosure threatens to significantly impair fundamental rights. Bates, 361 U.S. at 524; NAACP, 357 U.S. at 463.

Anonymity on the Internet is itself a fundamental right that must be protected absent a "compelling" need. Bates, 361 U.S. at 524; NAACP, 357 U.S. at 463. "The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1093 (W.D.Wash. 2001). In holding that a corporation's need was not compelling enough to warrant disclosure when compared to the First Amendment right of an anonymous poster, the court in 2TheMart.com stated, "discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts." Id. at 1093.

Recent cases have required plaintiffs to demonstrate a compelling need for anonymous Internet users' private information. In Columbia Ins. v. Seescandy.com, supra, 185 F.R.D. 573, the plaintiffs sued several defendants based on registration of Internet domains that used the plaintiff's trademark. Summarizing the chilling effects of discovery, the court noted, "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." Id. at 578. The Seescandy.com court required the plaintiff to do four things before authorizing discovery against anonymous defendants: first, identify the individual defendants "with sufficient specificity" in order for the court to determine jurisdictional requirements are met; second, "identify all previous steps taken to locate the elusive defendant" in order to determine that a good faith effort had been made; third, demonstrate to the court that there are viable claims against the defendants, including the ability to survive a motion to dismiss; and fourth, justify the need for the information requested, including an identification of a limited number of people who might be served, as well as how such discovery will lead to identifying information about the defendant that would make service of process possible. Id. at 578-581.

In the more recent case of Dendrite International, Inc. v. John Doe, No.3, supra, 342 N.J. Super 134, a New Jersey court applied Seescandy.com to a situation much like the one at bar. The plaintiff in Dendrite brought a defamation suit against an anonymous poster on a Yahoo! bulletin

board. It subsequently moved – unsuccessfully – for disclosure of the user's identity. In upholding the trial judge's decision, the court's appellate division focused primarily on the third prong of the Seescandy.com test – whether plaintiff's Complaint could withstand a motion to dismiss. In so doing, the court emphasized that the threshold is not merely whether plaintiff's case "would survive a traditional motion to dismiss for failure to state a cause of action." Id. at 157. Rather, the test is more "akin to the process used during criminal investigations to obtain warrants." Id. at 155. That is, plaintiff must establish probable cause "that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed the act." Id. at 156. In this way, the court can make sure "that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." Ibid.

C. Because Rocker cannot show probable cause that harry3866 committed an act giving rise to civil liability, there is no compelling interest that would warrant destroying Movant's First Amendment right to speak anonymously at Yahoo! message boards.

Taken together with the Supreme Court's Bates decision, Dendrite and Seescandy.com establish that, in order to demonstrate a compelling interest sufficient to overcome Movant's First Amendment right to speak anonymously, Rocker must, among other things, show probable cause that Movant has committed some civil wrongdoing against Rocker. This, Rocker will be unable to do.

1. Rocker cannot establish probable cause that harry3866 is liable for unlawful restraint of trade.

Rocker's initial cause of action is for unlawful restraint of trade. The apparent theory for this claim is that harry3866, along with other users of Yahoo!'s message boards, somehow conspired to "intimidate [Cohodes] into changing his expressed views about ESS Technologies." Exhibit B, ¶ 8. In support of this theory, Rocker cites only two postings from "marc-chodes_ate_a_turd_sandwich" – one which asserts that Cohodes was probably six months away from imprisonment, and another which asks "Where does this cohodes guy live? I need to know." Id., ¶ 8. In addition, Rocker also cites a posting from "THE_BEAR_BEAR," which states, "I am surprised

Cohodes hasn't been Killed yet." Ibid. The Complaint fails to set forth any threatening postings made by harry3866. In fact, it not only fails to set forth any threatening postings; it fails to show that harry3866 made **any** postings at the ESST board – the board which is the subject of the first cause of action. Moreover, this failure is no mere oversight, for the "Documents Requested" portion of the Yahoo! subpoena shows that, of the 15 postings which are attributed to harry3866, none appeared at the ESST board. Exhibit C, pp. 5-6. Thus, even if Rocker has an actionable claim for restraint of trade based on statements made at the ESST board, that action cannot extend to a person such as harry3866 who has never even used that message board – let alone post any threatening messages there, aimed at changing Cohodes' views on the stock.

Furthermore, it is worth noting that Rocker has not made out a valid case of restraint of trade even as to the ESST posters. In order to properly plead a claim for unlawful restraint of trade, plaintiff must show: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce. Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996). Here, Rocker's Complaint fails to establish any of these three elements. Far from alleging any unlawful conspiracy among the defendants, the Complaint describes nothing more than a group of unrelated, anonymous persons, who independently corresponded with each other by posting messages at a particular bulletin board. The fact that some of these persons happened to share a common feeling of anger toward Rocker and Cohodes does not remotely establish that they had an implicit agreement to "intimidate [Cohodes] into changing his expressed views about ESS Technologies." Exhibit B, ¶ 8.

In addition, the Complaint also fails to allege that the defendants' conduct impacted Rocker's business, or interstate commerce in general. For instance, the Complaint does not assert that Rocker's business has suffered because of the defendant's postings. It does not assert that the defendants' postings have affected the price of ESST. It does not assert that Cohodes has actually been intimidated into changing his stock selections. And it does not assert that Cohodes ever felt personally threatened by the defendants' postings.

In short, Rocker's Complaint falls woefully short of establishing even a prima facie case of unlawful restraint of trade, let alone probable cause that the claim could ever actually succeed.

Therefore, under the third prong of the Seescandy.com test, plaintiff has failed to demonstrate a compelling basis for ordering disclosure of harry3866's identifying information.

2. Rocker cannot establish probable cause that harry3866 has committed business libel.

Rocker's second cause of action is for business libel. On this claim, unlike the first, Rocker does set forth specific allegations about postings made by harry3866. Specifically, Rocker alleges that harry3866 accused plaintiff of "threatening analysts who are bullish" on particular stocks and "spreading lies" about stocks. In addition, the Complaint also alleges that harry3866 posted messages stating that Rocker was the subject of an SEC investigation. Exhibit B, ¶ 10.

As an initial matter, plaintiff's Complaint fails to allege an essential component of libel – namely, that harry3866's statements were false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-776 (1986). Absent an allegation of falsity, the claim would not even survive a motion to dismiss for failure to state a claim. Fed.R.Civ.Pro. 12(b)(6).

More fundamentally, to prevail on an action for libel, Rocker will not only have to prove that harry3866's statements were false, but also that they could reasonably have been understood as describing actual facts, as opposed to just the speaker's opinion. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1193 (9th Cir. 1989). While false assertions of fact may be actionable as defamation, statements of opinion constitute protected speech within the ambit of the First Amendment. Milkovich, supra, 497 U.S. at p. 20; New York Times Company v. Sullivan, 376 U.S. 254, 270 (1964). As the Supreme Court has pointed out, "The First Amendment recognizes no such thing as a 'false' idea." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

Whether a statement constitutes an opinion or a "provably false factual assertion" is a question of law which the court must decide. Rodriguez v. Panayiotou, 314 F.3d 979, 985 (9th Cir. 2002). In doing so, it must examine "the totality of the circumstances – looking at the statement

> both in its broad context, considering the general tenor of the entire work, the subject of the statements, the setting, and the format of the work, and in its specific context, noting the content of the statements, the extent of figurative or hyperbolic language used, and the reasonable expectations of the audience in that particular situation. Id. at 986, internal quotations omitted.

In this regard, the Ninth Circuit has cited with approval a line of California cases holding that, "where potentially defamatory statements are made in the context of a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." Id. at 985.

The importance of context in distinguishing fact from opinion was also famously illustrated in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the case that spawned the movie, People v. Larry Flynt. There, Jerry Falwell brought suit for intentional infliction of emotional distress based on a parody which portrayed him as an alcoholic hypocrite whose first sexual encounter occurred "during a drunken incestuous rendezvous with his mother in an outhouse." (Id. at 48.) The Supreme Court reversed the jury's verdict in favor of Falwell, noting that Falwell was a public figure, that the magazine parody could not reasonably be construed as an assertion of actual fact, and that the parody was an expression of ideas and, thus, protected by the First Amendment.

In another case involving Hustler, the magazine took aim at prominent feminist Andrea Dworkin, a frequent and outspoken critic of pornography. Dworkin v. Hustler Magazine Inc., supra, 867 F.2d 1188. For instance, in one edition, the magazine showed photographs of a man performing oral sex on an obese woman, with a caption indicating that the woman could be Andrea Dworkin's mother. In evaluating whether such assertions constituted defamation, the Ninth Circuit placed heavy emphasis on context. It then observed that Flynt and Dworkin were involved in "a heated and spirited debate on pornography . . . in which epithets, fiery rhetoric and hyperbole are expected." Id., at 1195. This, plus the fact that the language appeared in a pornographic magazine, served to "rob[] the statements of defamatory meaning." Id. at 1193.

In the instant case, Rocker claims that harry3866 defamed the company and its employee Marc Cohodes by asserting that Cohodes engaged in professional improprieties and was being investigated by the SEC. However, in order for this claim to be viable, Rocker must demonstrate that statements made on an Internet message board can reasonably be understood as assertions of

fact. A federal court in California's Central District recently rejected this very premise in Global Telemedia v. Doe, 132 F.Sup.2d 1261 (C.D.Cal. 2001) – a case almost identical to this one.

In Global Telemedia, a publicly-traded company brought a libel suit against anonymous Internet users who had posted various rantings about the company. As in the instant case, one of the defendants' assertions was that plaintiff had been "busted for misrepresentation" and was now being looked at by the SEC. Id. at 1268. In evaluating whether these statements constituted fact or opinion, the court took note of the "general cacophony" of the Internet message boards, as well as the large number of messages posted, the lack of formality and polish to the postings, and the animated and exaggerated tenor of the statements. Id. at 1267-1268. In addition, it also found it significant that the message boards are not sponsored by the company itself and require no special expertise in order to post or respond to a message. Id. at 1264. In light of these surrounding circumstances, the court found that "a reasonable reader would not think [defendant] was stating facts about the company, but rather expressing displeasure with the way the company is run." Id. at 1270. It thus found that the plaintiff could not obtain additional discovery in the matter, as it had not met its burden of demonstrating a probability that its claims would succeed. Id. at 1271.

As Global Telemedia recognized, an Internet message board is, by its very nature, a venue which cries out for viewer skepticism. Unlike a newspaper, a magazine, a company website, or even a political leaflet, there is nothing about the message board context which would induce a reasonable reader to believe that the posters possess any special knowledge or expertise about the subjects on which they opine. Furthermore, in the unlikely event that a reader might fail to discern the inherently unreliable nature of message board "information," Yahoo! itself posts a reminder at the bottom of each page – stating that the message board is not affiliated with the company and that the messages posted are merely expressions of the poster's individual opinion. Wollack decl., ¶ 14; Exhibits D-I. While those opinions occasionally become personal, vulgar, and accusatory, it is precisely this amateurish tone which – like the pornographic backdrop in Dworkin – "robs the statements of defamatory meaning." Dworkin, supra, 867 F.2d at 1193.

Finally, in assessing whether harry3866's statements constitute factual assertions or opinions, this court should not lose sight of the fact that, in light of the many recent and well-publicized

scandals at companies like Enron, Global Crossing, Arthur Anderson, and Merrill Lynch, the conduct of investment management firms and fund managers are, even more than ever, matters of keen public interest. Global Telemedia, supra, 132 F.Supp. at 1265. Thus, like Jerry Falwell and Andrea Dworkin in the two Hustler Magazine cases, Rocker and Cohodes must reasonably expect that they might be fair game for public commentary. This is particularly true in the case of Cohodes, who has been none too reticent in airing his own opinions about corporate malfeasance. A Google search for Cohodes' name yields 154 hits, many of which show newspaper articles in which he is quoted. Wollack decl., ¶ 9. A review of these articles shows that Cohodes has cultivated an image as an aggressive "short seller," who once told Business Week magazine that he targets companies he believes to be "fads, frauds, and failures." See Exhibit J, p. 2. Furthermore, when Cohodes finds a company he believes to fit this description, he does not hesitate to make his allegations public. For example, in a September 19, 2002 article at CNN Money's website, Cohodes bluntly explains EDS's sharp price decline, by stating, "What we're [seeing] is that investors have no patience for a company that whips up numbers and lies." Exhibit K, p. 2. In another article, Cohodes accuses TTWO of misstating revenue, further adding that, "Crime does pay." Exhibit L, p. 4. And in the previously mentioned Business Week article, Cohodes accuses Cisco of "a total spin job" in their recent inventory writeoff. Exhibit J, p. 2.

To be sure, no one can begrudge Cohodes his opinion. Quite to the contrary, he may well be performing a valuable public service by calling attention to what he believes to be possible instances of corporate fraud. Such forceful commentary no doubt serves to enhance the overall quality of information available to would-be investors.

At the same time, it is truly ironic that someone who himself makes a living by criticizing other companies would then turn around and cry "defamation!" when he himself becomes the target of similar innuendoes. Indeed, if you took harry3866's very same message board comments and replaced the word "Rocker" with the word "TTWO," the comments would appear remarkably similar to the types of allegations which Cohodes himself has levied in various newspaper and magazine articles.

As the Supreme Court has observed, "Those who thrust themselves to the forefront of particular public controversies . . . invite attention and comment." Gertz, supra, 418 U.S. at 345. Because of the "robust political debate" which the First Amendment encourages, those who make a public spectacle of their opinions must also expect to be held up to "vehement, caustic, and sometimes unpleasantly sharp attacks." Falwell, 485 U.S. at 51. "The candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." Monitor Patriot Co. v. Roy, 401 U.S. 265, 274.

The Supreme Court's comments take on special significance in this case for Cohodes is not only a public figure, but one whose job requires him to assess the outlook of companies based, in many cases, on incomplete information. Despite these inherent limitations, Cohodes has not been one to shy away from making accusatory or absolute statements. In this case, harry3866 has made equally forceful comments about Cohodes himself – comments which may, in fact, be speculative or based on false or incomplete information. However, it is for this very purpose that the Supreme Court established the "public figure rule" – a rule which sets a higher bar for defamation claims when the plaintiff is a public official or public figure. New York Times v. Sullivan, supra, 376 U.S. 254. If access to complete information were a prerequisite to social commentary, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Id. at 279.

Should this court allow Rocker to pursue this frivolous claim by uncovering personal information about harry3866's true identity, it will have a serious chilling effect on other would-be speakers – potentially deterring them from posting their own opinions on Internet message boards. The casualties of such an outcome would not be limited to just the profane and sophomoric postings, but the thoughtful and serious ones as well. In the end, such a result would seriously dilute the quality of discourse and discussion which takes place via the Internet.

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IV. CONCLUSION

In order to overcome Movant's First Amendment right to speak anonymously, plaintiff must demonstrate a compelling interest. Even if plaintiff establishes some actionable claim against Movant, the Court must weigh the strength and viability of that claim against Movants' First Amendment right. If the case is weak, discovery will provide little benefit, yet there will be irreparable harm to the speaker. Here, plaintiff has not demonstrated that Movant did anything other than assert his First Amendment right to express his opinion on matters of public importance. Such facts do not constitute a compelling interest that would warrant abridging Movant's fundamental right to speak anonymously. Therefore, this court should quash the Yahoo! subpoena.

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Respectfully Submitted,

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