Reply Memo in Support of Motion to Quash Subpoena in re 2theMart

Right to Speak Anonymously Online Deserves Constitutional Protection

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re 2TheMart.com, Inc. Securities Litigation	Case No: C01-453Z (formerly MS 01-16) **REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH** ORAL ARGUMENT REQUESTED

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1 THE RIGHT TO SPEAK ANONOMOUSLY REQUIRES PROTECTION AGAINST UNWARRANTED INVASION

2 The Purported Distinction Between Speaking Anonymously and Remaining Anonymous Is Unworkable and Unsupported by Case Law

All the parties to this motion agree that the First Amendment protects Doe's right to speak anonymously, but TMRT argues that the right vanishes the very moment after it is exercised. The logical conclusion of TMRT's argument is that a party can use the court's subpoena power to unmask any anonymous speaker at any time after he or she speaks, destroying pseudonymous online identities without even giving the speaker the opportunity to object. The purported distinction between speaking anonymously and remaining anonymous is without a difference.

TMRT is mistaken in its assertion that no Court "ever held that the First Amendment blocks the efforts of others to determine a speaker's identity." TMRT Brief at 3. Courts commonly protect the right of speakers to remain anonymous where anonymity enhances the marketplace of ideas and disclosing speakers' identities would chill speech. An evidentiary showing of need is required before the machinery of the state may be used to reveal a speaker's identity. "Mere relevance is not sufficient." Rancho Publications v. Superior Court, 81 Cal.Rptr.2d 274 (Cal. App. 1999) (applying First Amendment privilege to preserve anonymity of group that purchased a paid newspaper advertisement).

TMRT argues that the Supreme Court "specifically refused to recognize the right to remain anonymous" in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999). TMRT Brief at 12. To the contrary, Buckley's primary holdings were to invalidate a state law requiring signature gatherers to be registered voters, id. at 197, wear name tags, id. at 200, and to file a disclosure form containing their names, addresses, and whether they were paid, id. at 204. Recognizing the unique obligations of the state to regulate ballot access to ensure fair elections, id. at 641, the Court mentioned (in dicta) that it did not object to the requirement that completed petitions be accompanied at the time of filing with an affidavit declaring that the circulator resides in state, did not bribe the signatories, and similar averments, id. at 189 n.7, 197. The Court noted that its dicta might not apply if the residency question had been squarely presented. Id. at 197. In any event, the affidavit did not allow the state to connect any particular signature gatherer with anonymous speech made while gathering signatures. This holding is a far cry from TMRT's assertion that no speaker ever has the right to remain anonymous.

Contrary to TMRT's characterization, TMRT Brief at 6, Doe does not argue that the right to remain anonymous is absolute. Instead, Doe argues that TMRT must carry its burden to demonstrate, via admissible evidence, a strong need for the information before it is released. Doe's position does not eliminate accountability for speech. It simply ensures that anonymity will not be judicially invaded without a strong initial showing that legal accountability is needed (or, as here, that identity is central to the underlying dispute). First Amendment rights require just this sort of "breathing space." New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

Heightened protection is necessary because once anonymity is breached, Doe has lost the right to speak anonymously forever. As InfoSpace notes, customers often use the same screen name across numerous message boards and may spend years cultivating an on-line identity and reputation. InfoSpace Brief at 6-7. Once the pseudonym is breached, Doe can no longer use the NoGuano identity to protect his anonymity for any other purpose; his anonymity as to all prior unrelated speech made as NoGuano is also eliminated. This disclosure of identity is not necessarily limited to speech on Silicon Investor about securities relevant to the underlying litigation.

3 Existing Case Law Protects Anonymous Speech Against Unwarranted Civil Discovery Absent a Strong Evidentiary Showing of Need

As shown by the various cases cited by InfoSpace and in Doe's opening brief, Courts are recognizing that the constitutional principles protecting anonymous speech in other media should be applied to the Internet. This trend is based on sound reasoning and should be followed here.

TMRT argues that the journalist's privilege is not an apt analogy because InfoSpace does not play the role of a journalist. This neglects that the journalist's privilege evolved to protect the anonymous speech of the journalist's sources. In the past, journalists were one of the most effective intermediaries between ordinary speakers and the mass audience, a conduit between an individual and the marketplace of ideas. Courts view this pipeline as essential to the national dialogue, not so much because of the journalist's speech, but because the journalist acts as a medium or amplifier for other speakers. The development of the Internet created an alternative medium. Doe no longer needs to use a journalist to convey messages to a mass audience. And just as news sources have their reasons to speak anonymously to journalists, on-line speakers have legitimate reasons to speak anonymously. Protection is especially important where a source

fears retaliation for their speech. While the medium has changed, the First Amendment protection for the users of the medium should not.

Contrary to TMRT's assertion, TMRT Brief at 7, group associations can and do exist based on Internet communication alone. InfoSpace brief at 6-7. In fact, many web sites market themselves as "online communities." Silicon Investor users congregate on the message boards because they share a common interest, and wish to communicate with others who share their interest. If these individuals gathered in a physical location, the attendance list for that meeting would be protected. Furthermore, message boards may be dedicated to sensitive subjects such as HIV-infection and other illnesses or political advocacy on issues such as abortion, around which users may form associations that take advantage of the anonymity the Internet allows. Id. at 7. TMRT would not argue that if these groups held their meetings in physical space instead of cyberspace, a court should allow a company to subpoena their membership lists without addressing the First Amendment concerns.

4 TMRT's EVIDENCE DOES NOT ESTABLISH A NEED FOR THE INFORMATION SUFFICIENTLY STRONG TO OVERCOME DOE'S RIGHT TO ANONYMOUS SPEECH

The TMRT defendants are accused of securities fraud by making untrue or misleading statements (with scienter) that artificially inflated the stock price, on which the plaintiff shareholders relied in making purchase decisions. The subpoena here arises from one of TMRT's defenses, that unlawful stock manipulation by persons who used the Silicon Investor web site led to artificial deflation of the stock price. TMRT suspects three users ("The Truthseeker", "trader14U," and "flodyie") of manipulation, based on their hyberbolic criticism of TMRT and its management. Cabotaje Decl., ¶ 7 & Exs. C-H. The only evidence regarding the other twenty anonymous speakers in the subpoena is counsel's unsupported assertion that they are "Silicon Investor users who have communicated with" the alleged wrongdoers. Id., ¶ 7. These alleged communications are not provided, nor are their contents described. In fact, TMRT does not dispute that "NoGuano" posted no messages regarding TMRT at any location, and no messages in the threads (internet dialogues) devoted to TMRT.

Although the precise phrasing of the legal test differs, courts facing First Amendment challenges to

discovery begin by asking whether the information is central to the case and cannot be obtained through other means. Snedigar v. Hodderson, 114 Wn.2d 153, 166, 786 P.2d 781 (1990); Los Angeles Memorial Coliseum Commission v. NFL, 89 F.R.D. 489 (C.D. Cal. 1981) (Pregerson, J.). TMRT has not shown that other means of investigation have been exhausted, or that its stock manipulation theory requires Infospace's information about these 23 identities. Short sellers may be identified through brokerage records that are already being obtained. Cabotaje Decl. ¶ 16. The supposedly damaging posts to Silicon Investor are already produced and have been used to TMRT's benefit in depositions. Id. ¶ 6.

TMRT also cannot show that the identities are central to its stock manipulation theory. The posts from the three alleged wrongdoers are expressions of opinion, see id. Ex. D ("As I was gazing through The Truthseeker Crystal Ball I saw terrible things for TMRT's future"); Ex. G ("Look out below! This stock has had it"), or hyperbolic attacks, Ex. E ("these guys are friggin liars"). Absent other evidence, expressing antagonistic (or favorable) opinions about a company in a public forum is hardly evidence of stock manipulation. If it were, the reasoning would apply equally to the *Wall Street Journal* and other business publications. There is even less evidence regarding the twenty other speakers whose anonymity is endangered by the subpoena. They are alleged merely to have "communicated" with the manipulators, although in at least Doe's case, the alleged communications are admittedly not about TMRT. Miller v. Asensio, 101 F.Supp.2d 395, 400 (D.S.C. 2000) found that claims of securities fraud were "colorable" only when statements about the security itself were alleged in the complaint. For speakers like NoGuano, who said nothing about the company, no securities fraud claim can possibly exist.

Moreover, the stock manipulation theory itself is not central to the case as a whole. Defendants can prevail without any reference to Silicon Investor messages, by disproving that their alleged statements were fraudulent or misleading, disproving scienter, or disproving the efficiency of the market. They may use the messages to show that anonymous on-line statements caused the stock price to shift, whether or not the speakers were manipulating. TMRT has retained an expert witness who appears to be preparing precisely such an argument. Cabotaje Decl., ¶ 17. If TMRT proves that the anonymous statements moved the share price, it will not matter whether the on-line speakers had pure or evil motives. Causation may be central to TMRT's case, but it is undisputed that the identities of the anonymous speakers are irrelevant to causation—because no investor relying on the statements knew who they were.

If the court nonetheless finds that the requested information is central to TMRT's case, it must still

determine whether the need for the information outweighs the constitutional interest in anonymity. See Snedigar, 114 at 166; Coliseum Commission, 89 F.R.D. at 494. This balance favors the anonymous speakers. TMRT's interest in civil discovery is less weighty than the state's interest in criminal cases. Coliseum Commission, 89 F.R.D. at 493. While this case is not a SLAPP suit aimed at stifling criticism, it bears disturbing resemblance to one. The overheated internet rhetoric that generated a charge of stock manipulation here is akin to the comments that have resulted in unsuccessful charges of defamation in other anonymous internet cases.

> The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange abouty GTMI and its turbulent history….Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.

Global Telemedia Int'l, Inc. v. Doe 1, 2001 U.S. Dist LEXIS 2852 (C.D. Cal. 2001) (attached). Rhetoric may be heated without being actionable. Greenbelt Publishing Association. v. Bresler, 398 U.S. 6, 14 (1970) ("even the most careless reader must have perceived that the word ["blackmail"] was no more than rhetorical hyperbole, a vigorous epithet."). One anonymous poster observed that TMRT "moniter[s] this thread minute by minute…and yet…no response." Cabotaje Decl., Ex. H. The remedy for speech TMRT dislikes is more speech, not enforced silence. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). TMRT's subpoena chills and reduces speech on the Internet. Quashing it upholds the recognized First Amendment rights to anonymous speech and association. The balance favors Doe.

DATED this ___ day of _________________, 2001.

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