

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division**

SOLERS, INC,

Plaintiff,

v.

JOHN DOE,

Defendant.

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Civil Action No.: 05-3779
Calendar #9
Judge Blackburne-Rigsby

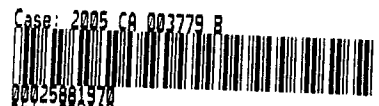
**ORDER GRANTING THIRD PARTY WITNESS SILA'S MOTION TO QUASH
SUBPOEA**

This matter comes before the court on Third-party witness SILA's Motion to Quash Subpoena, Plaintiff's opposition, third-party witnesses reply and plaintiff's and third-party witnesses supplemental memorandum.

I. Facts

This case arises out of a defamatory statement allegedly made by an unknown individual John Doe ("Doe") about Solers, Inc. ("Solers") to a trade association, Software & Information Industry Association ("SILA") located in the District of Columbia. Solers is a Virginia company whose work principally consists of developing software and other technology for agencies within the Department of Defense.

SILA is the principal trade association for the software and digital content industry. SILA's primary objective is to protect the intellectual property of member companies by fighting software piracy. To that end SILA established an Anti-Piracy Division and developed anti-piracy programs. One such program enables sources with knowledge of software piracy to report anonymously to SILA, via telephone or the internet, about companies using unlicensed software, offering software illegally on the internet or re-selling



unlicensed software. SILA then decides whether to pursue the reports concerning software piracy. Information is submitted on a confidential basis and rewards of up to \$50,000.00 are offered for reports of verifiable corporate end-user piracy.

Doe reported to SILA via the Internet in March of 2005 that Solers was allegedly using unlicensed software. Solers learned of Doe's report on May 2, 2005 when the President of Solers received a letter from William Stevens who identified himself as an attorney representing SILA. The letter accused Solers of copyright infringement of computer software published by companies that were listed in the letter. Between May 2, 2005 and May 13, 2005 representatives of SILA and Solers communicated regarding Doe's allegations of software piracy by Solers. Solers reviewed its computer systems and confirmed that it had not violated any copyright. Solers also requested that SILA disclose the identity of the individual who made the statements accusing Solers of copyright infringement. SILA informed Solers that the terms of its Anti-Piracy Program precluded voluntary disclosure of Doe's identity. At this time, SILA has decided not to pursue a claim against Solers on Doe's allegations of copyright infringement.

Solers decided to file the instant lawsuit to obtain through subpoena the identity of the undisclosed informant so that Solers could pursue legal remedies against Doe. The complaint was filed on May 18, 2005 and alleges defamation, tortious interference and injunctive relief. The complaint also seeks monetary relief as well as an order requiring Doe to cease and desist from further publication of defamatory statements. After filing the complaint Solers served a subpoena on SILA seeking documents that were relevant to Doe's alleged defamatory statements regarding Solers. On June 9, 2005 SILA filed objections in response to the subpoena. On June 10, 2005 Solers filed a Motion for an Order to Show Cause and a Motion

to Enforce Subpoena. On June 24, 2005 SILA filed a Motion to Quash the Subpoena, and an opposition to Solers Motion to Show cause was filed on July 1, 2005. On July 8 Solers filed its opposition to SILA's Motion to Quash the Subpoena, Solers filed a reply on July 13, 2005. On December 14, 2005 SILA filed supplemental authority to its Motion to Quash the Subpoena, Solers responded on January 25, 2006 and SILA replied on February 3, 2006. The undersigned judge held a hearing on the motions on December 16, 2005. A Status Conference was also held on April 28, 2006 where supplemental memoranda were requested.¹

SILA argues that the subpoena must be quashed because it seeks production of privileged or protected material. Specifically SILA contends that the information requested is protected by the First Amendment and the work product doctrine, and subjects SILA to an undue burden. Solers counters that Doe's statements are not protected by the First Amendment nor the work product doctrine, and the subpoena is not unduly burdensome.

II. Legal Standards

Pursuant to Superior Court Rule of Civil Procedure 45(3)(A), the Court shall quash or modify a subpoena if it "requires disclosure of privilege or otherwise protected matter and no exception or waiver applies." When a motion to quash is based on a claim of privilege, the recipient of the subpoena is either entitled to the protection of the privilege or not. *In re Public Defender Serv.*, 831 A.2d 890, 898 (D.C. 2003).

When a motion to quash a subpoena is based on grounds other than privilege the trial court typically relies on fact-specific determinations of unreasonableness and oppressiveness, which are quintessentially discretionary judgment calls. *Id.* In making those determinations, the trial court has the ability to choose from a range of permissible conclusions and can rely

¹ The undersigned requested briefing on plaintiff's allegation of actual injury under District of Columbia Law and the steps taken by the plaintiff to learn the identity of Doe. SILA did not have notice of the hearing and did not attend, however it did submit a supplemental memorandum.

largely upon its own judgment in choosing among the alternatives. *Id.* A subpoena shall also be quashed if it subjects a person to undue burden. Super. Ct. Civil R. 45(3)(A)(iv).

III. Analysis

SILA argues that the First Amendment protects the requested information, Doe's identity. SILA argues that the standard to be applied where the subpoena seeks the identity of an anonymous speaker is, whether the subpoenaing party exhausted other methods of obtaining the information, a determination of whether jurisdiction exists over the defendant whose identity is sought and a requirement that the plaintiff establish that its suit against the defendant would withstand a motion to dismiss. *Columbia Ins. Co v. Seecandy*, 185 F.R.D. 573, 578-580 (N.D. Cal. 1999); *see also Dendrite Int'l v. Doe* 775 A.2d 756,772 (N.J. Super. Ct. 2001)²; *Highfields Cap Mang. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005). Solers does not argue that this is the incorrect standard to apply, but it does assert that the information is not protected by the First Amendment because it is business speech, that it does have personal jurisdiction over Doe and its claims against Doe can survive the motion to dismiss standard.

In *SeesCandy* the plaintiff sought the identity of owners for alleged infringement on Sees Candy domain name. *SeesCandy*, 185 F.R.D at 579. That court held that, among other factors, plaintiff's suit against defendant would have to withstand a motion to dismiss. The court in *SeesCandy* noted that the "requirement [was] necessary to prevent abuse of [an] extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant." *Id.* The allegations in *SeesCandy* withstood the motion to dismiss standard.

² This test is "to act as a flexible, non-technical, fact-sensitive mechanism for court to use as a means of ensuring 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. *Dendrite Int'l*, 775 A.2d at 771.

In *Dendrite* the plaintiff corporation brought a defamation suit against John Doe defendants for posting a message on an Internet Service Providers bulletin board regarding the corporation's accounting practices. *Dendrite Int'l*, 775 A.2d at 759. The court in *Dendrite* affirmed the trial court's use of a heightened motion to dismiss standard, which required more evidentiary support for the harm/injury element of the defamation claim than is normally required for motion to dismiss standards. *Id.* at 769. This standard was applied because the "motion-to-dismiss standard in isolation fail[ed] to provide a basis for an analysis and balancing of the [corporations] request for disclosure in light of [Doe's] competing right of anonymity in the exercise of his right of free speech. *Id.* at 770

In *Highfields* a corporation brought a claim for defamation and commercial disparagement against an anonymous defendant for statements made on an Internet message board using the firms name. The corporation served the subpoena on Yahoo! for disclosure of Doe's identity. The test articulated by the court in *Highfields* requires "the evidence that plaintiff adduces [to]...support a finding of *each* fact that is essential to a given cause of action" *Highfields*, 385 F.Supp. at 975-76 (emphasis in original). The second component of the test "requires the court to assess and compare the magnitude of the harms that would be caused by competing interest by ruling in favor of plaintiff and by ruling in favor of defendant" *Id.*

Under any of the test⁵ articulated, a motion to dismiss or any heightened motion to dismiss standard, Solers has not made a claim of relief for its defamation allegation. Solers alleges that the statements made by Doe are defamatory. To establish a cause of action for defamation, the plaintiff must demonstrate:(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without

privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Carter v. Hahn*, 821 A.2d 890,893 (D.C. 2003). SILA argues that Solers has not stated a cause of action for defamation because it alleges no facts to demonstrate that it has suffered any harm/injury. Solers counters that in the District of Columbia a defamation injury can occur when a plaintiff's business reputation is either harmed or *threatened* with harm.

For its proposition that threatened harm is sufficient for a defamation claim, Solers relies on *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996). In *Ayala* the plaintiff, an airline pilot, brought a defamation suit against his former girlfriend for statements she made to his employer and the FAA that he used marijuana during his off duty hours. The Court of Appeals overturned the trial court's ruling which set aside the jury verdict in favor of the pilot and entered judgment for the pilot's girlfriend. Contrary to Solers argument *Ayala* does not stand for the proposition that threatened injury is sufficient for a defamation claim. The court found that because the defendant's statements created a significant risk of consequences and they were proven to be made with constitutional malice the jury's award of \$1.00 in punitive damages and \$1.00 in compensatory damages was not improper. *Id.* at 1070.

Solers argues that it was injured because the publication was targeted to the narrow business community in which it operates. However, publication towards a targeted community does not establish harm. Solers must show actual harm. *See Dendrite Int'l*, 775 A.2d at 770 (finding that harm was not proven where the plaintiff had not "established that fluctuations in its stock prices were a result of John Doe's postings, and could not find any nexus between the postings and could not find any nexus between the postings and the drop in

Dendrite's stock prices). Solers has not substantiated that any of its Department of Defense contracts, Solers main client, have been compromised by Doe's statements. Further, SILA decided not to pursue Doe's claim that Solers engaged in software piracy. In its supplement Solers argues that the law in the District of Columbia does not require economic injury to prove a *prima facie* case for defamation. It argues that reputational harm is sufficient. SILA counters that a corporate plaintiff must demonstrate actual damages in the form of lost profits.³ Even if Solers only had to demonstrate harm to its reputation regardless of lost profit, it has not done so. Although there are some classes of statements which alone cause harm, the mere allegation by Doe of copyright infringement in and of itself does not establish harm to Solers reputation.

Additionally, even if threatened harm were sufficient for a defamation claim, Solers has not demonstrated any risk of harm, unlike in *Ayala* where the statements created a "significant risk of consequences" *Id.* There is no indication that any entity other than SILA had knowledge of Doe's alleged defamatory statements. This information, unlike in *Dendrite* and *Highfields* was not published over a public message board or website, but rather was conveyed to SILA confidentially. It is unlikely that a risk of harm can exist because the statements were made only to SILA and SILA has opted not to pursue Doe's allegations. Because Solers claim could not withstand a motion to dismiss standard, its need for Doe's identity is not outweighed by SILA's interest in keeping that identity private. *SeesCandy*, 185 F.R.D. at 578.

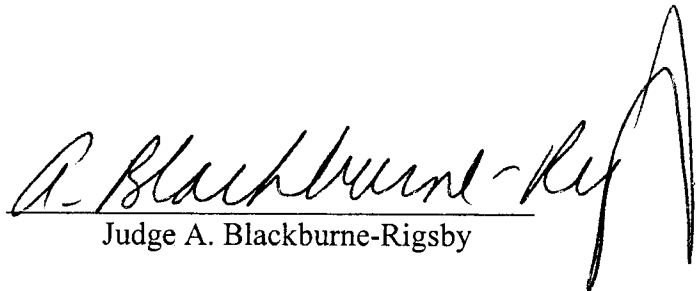
Finally, Solers has failed to demonstrate that it exhausted alternative methods of obtaining Doe's identity. Only after a litigant has shown that he has exhausted every

³For this proposition SILA cites *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1987) ("The law of libel has long reflected the distinction between corporate and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits.").

reasonable alternative source of information that a court will grant a subpoena as requested by Solers'. *Wheeler v. Goulart*, 593 A.2d 173, 175 (D.C. 1991). Solers conducted a review of Solers' e-mail server in an effort to determine if an employee of the company used computers under Solers' control to make defamatory statements to SILA. Solers attempted a single alternative in gaining Doe's identity. This cannot be said to be an exhaustion of every reasonable alternative source. For instance, as argued by SILA, Solers could have searched other computer records besides the email server or it could have interviewed current and former employees.

Accordingly, upon consideration of SILA's Motion to Quash the Subpoena and the entire record herein it is this 16th day of August, 2006 hereby

ORDERED that the Motion to Quash is **GRANTED**.


Judge A. Blackburne-Rigsby

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