

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark Beale

Plaintiff,

v.

John Doe

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-1097

**ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL**

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2017 AUG 23 PM 4:49
JULIE J. AMBROSIO
CLERK OF COURT

This matter came before the Court for a hearing on Plaintiff's Motion to Compel filed on July 3, 2017. Present for the Plaintiff, Mark Beale, was attorney Steven Abrams. Present for Google, a non-party, were attorneys Jim Griffin and Maggie Fox.

Plaintiff is a doctor from Charleston, South Carolina. Defendant, John Doe, has yet to be identified. Plaintiff alleges that on or about October 16, 2016, a person using the screen name "Richard Hill" posted a one-star review on the Google Maps site associated with Plaintiff's medical practice. Plaintiff claims the review is defamatory and implicitly false because Plaintiff has never treated a patient named Richard Hill and because a purported non-patient would have no legitimate basis for rating Plaintiff.

This Motion seeks to enforce Plaintiff's Subpoena Duces Tecum to Google, Inc., which was served on March 6, 2017. Plaintiff seeks to enforce the subpoena for identifying information regarding one of Google's subscribers, the author of the online review of Plaintiff's medical practice. Plaintiff is requesting that Google provide the IP address and email address of the user who posted the review. Plaintiff believes the name used, "Richard Hill," is not the

author's real name; therefore, plaintiff is also seeking information associated with Richard Hill.

A. Jurisdiction

Google argues the subpoena is invalid and that the Court does not have jurisdiction over Google's out-of-state records custodians and that Google is not subject to general personal jurisdiction. Google was initially served via its South Carolina registered agent in Columbia, South Carolina. Google served timely objections to the subpoena asserting that it had not been properly served under California law and that service on its registered agent did not confer subpoena power over an out-of-state third party witness. In response, Google was additionally personally served with the same subpoena at its South Carolina corporate place of business, a \$1.2 Billion Dollar Data Center in Moncks Corner, South Carolina. Plaintiff argues the *in rem* and/or *quasi in rem* jurisdiction conveyed by service at Google's data center satisfies Plaintiff's legal obligation. The Court agrees.

Therefore, from a jurisdiction standpoint, Plaintiff has subpoena power over any legally discoverable data contained within Google's servers located in South Carolina and any data than can be accessed over Google's network from its data center in South Carolina. If the information sought exists on the servers in Moncks Corner or can be accessed within that data center, it must be produced within the bounds of the South Carolina Rules of Civil Procedure and the terms of this Order.

B. South Carolina Rules of Civil Procedure

Google challenges the subpoena on the grounds that the information sought is irrelevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevance is the standard for

admissibility, but not discoverability:

"Parties may obtain discovery . . . which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the *information sought appears reasonably calculated to lead to the discovery of admissible evidence.*" Rule 26, SCRPC. (*emphasis added*).

The Court finds the information sought in this matter is both relevant and tends to lead to the discovery of admissible evidence.

Google also claims the subpoena is overly broad and unduly burdensome. The Court finds Plaintiff's subpoena complies with Rule 45, SCRPC, as it is limited to material that is readily accessible and relevant. Plaintiff's subpoena gave Google ample time to respond. Google conceded it possesses the information sought and has preserved it. It does not appear the information was unduly burdensome to obtain. It cannot possibly be unduly burdensome to physically produce. The Court will address intangible burdens with a protective order.

C. First Amendment Rights to Anonymous Internet Speech


Google also objected to the subpoena on the grounds that it does not comport with the First Amendment. Google's standing to raise its user's First Amendment rights is undisputed. *See State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 651 n.7 (2013) (service providers have standing to assert free speech rights of their users). The South Carolina Supreme Court has stated "'[i]t is clear that speech over the internet is entitled to First Amendment Protection' and that '[t]his protection extends to anonymous internet speech.'" *Id.* at n.6 (quoting *Cahill*, 885

A.2d at 456).

D. Discovery Standards for Online Defamation

The issue before the Court is what standard applies. There is no judicial consensus as to what test to use for a discovery dispute involving the identity of an anonymous internet user in an online defamation case.

Because South Carolina has not established a test to unmask the author of an anonymous defamatory internet posting, the Court must look to other federal and state courts for persuasive authority. State Courts have applied three different tests. Courts have required plaintiffs to demonstrate one of the following:

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- (1) a good faith basis warranting disclosure;
 - (2) evidence sufficient to survive a motion to dismiss before allowing disclosure; or
 - (3) evidence sufficient to survive a hypothetical motion for summary judgment.


Here, Plaintiff seeks to apply the standard requiring the least stringent proof (the good faith standard) and Google has asked the Court to apply the standard requiring the most robust proof (the summary judgment standard).

1. The Good Faith Standard

The good faith standard, adopted in *In Re Subpoena Duces Tecum to Am. Online, Inc.*, requires a plaintiff to show only that his or her claim was made in good faith and not out of intent to harass the defendant. *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26 (2000), rev'd sub nom. *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001). The decision was reversed and remanded by the Supreme Court of Virginia, but not on the good faith standard. The decision was reversed stating that (1) the Plaintiff, a corporation, could not proceed anonymously under the Uniform Foreign Depositions Act (UFDA), and (2)

comity was improper. *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001). The good faith standard applied in *In Re Supoena Duces Tecum to Am. Online, Inc.*, is still instructive, given there is no available South Carolina law on what standard to apply.

In *In Re Supoena Duces Tecum to Am. Online, Inc.*, the plaintiffs alleged that several John Does anonymously posted defamatory statements in various online chat rooms and the plaintiffs sought to discover the identity of the John Does. *Id.* The Court applied a balancing test weighing “a state’s interest in protecting its citizens against potentially actionable communications on the Internet” against the right to anonymously speak online. It was held that a court should only order a non-party, internet service provider to provide information concerning the identity of a subscriber when:

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- (1) the court is satisfied by the pleadings or evidence supplied to that court;
 - (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed; and
 - (3) the subpoenaed identity information is centrally needed to advance that claim.

Id. Under this standard, the plaintiff must only demonstrate that a cause of action *may* exist and that the claim was made in good faith. Other courts have rejected this standard.

2. The Motion to Dismiss *Prima Facie* Case Standard

In *Dendrite International v. Doe No. 3*, the Superior Court of New Jersey Appellate Division applied a *prima facie* case standard, which requires a plaintiff to satisfy a four-prong test equivalent to surviving a hypothetical motion to dismiss. *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760, n. 1 (N.J. Super. Ct. App. Div. 2001). The plaintiff in *Dendrite* sought the

identity of an anonymous internet speaker through discovery with Yahoo!, an internet service provider, due to alleged defamation made on a Yahoo! Bulletin board. *Id.* The first prong requires the plaintiff to “undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application.” *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). These notification efforts should include posting a message on the ISP's pertinent message board notifying the anonymous user of the discovery request. *Id.* Second, the plaintiff must identify the precise alleged actionable speech made by the anonymous poster. *Id.* at 760. Third, the plaintiff must establish that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted and must produce sufficient evidence supporting each element of its cause of action, on a *prima facie* basis, before a court can order the disclosure of the identity of the unnamed defendant. *Id.* Lastly, if the court concludes that the plaintiff can survive a motion to dismiss, 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. The standard in *Dendrite* requires much more of a plaintiff than the good faith standard, but less than what was required in *Doe v. Cahill*, cited by the South Carolina Supreme Court in *State v. Brockmeyer*, discussed below.


3. The Motion for Summary Judgment Standard

State v. Brockmeyer is the closest South Carolina has come to addressing the issue before this Court. The Court in *Brockmeyer* did not reach the issue of the appropriate standard for obtaining discovery regarding an anonymous internet user under the First Amendment

because the defendant did not properly preserve the issue, 751 S.E. 2d at 652-53.


In *Cahill*, the Delaware Supreme Court observed that anonymous speech on the internet serves an important purpose by "mak[ing] public debate in cyberspace less hierarchical and discriminatory than the real world because it disguises status indicators such as race, class, and age," while also acknowledging it "is clear that the First Amendment does not protect defamatory speech." U.S.C.A. Const. Amend. 1. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Accordingly, courts "must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation." *Id.*

In *Cahill*, the Court held that in order to disclose the identity of an anonymous online commentator, a plaintiff must survive a hypothetical motion for summary judgment by making a *prima facie* showing in the complaint for each element of the claim.



E. Plaintiff Mark Beale's Subpoena Duces Tecum

Although *Brockmeyer* is the only South Carolina case on point, it did not go so far as to adopt the standard in *Cahill*. *Cahill*, quoted approvingly in *Brockmeyer*, is instructive; however, it is important to note that the type of speech in *Cahill* was political speech. In *Cahill*, the plaintiff was a city councilman and the alleged defamatory comments were posted on a local political website. The type of speech involved in this case is an online business review, which is commercial speech. Courts have held commercial speech should require a less stringent approach than political speech. The Ninth Circuit addressed this issue in *In re Anonymous Online Speakers* and suggested the standard in *Cahill*, although potentially appropriate for political speech, does not apply to commercial speech. *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011).



The right to speak, whether anonymously or otherwise, is not unlimited, under the First Amendment, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue. U.S.C.A. Const. Amend. 1. Courts afford political speech the highest level of protection. U.S.C.A. Const. Amend. 1. *Id.* The nature of the type of speech should be a driving force in choosing a standard by which to balance the First Amendment rights of anonymous speakers in discovery disputes. U.S.C.A. Const. Amend. 1. *Id.* This Court agrees with the Ninth Circuit that the identity of an alleged defamer should be revealed more easily in commercial speech cases. While noting different types of speech require different types of protection, the Court does not intend to neglect the principle that certain types of speech are not protected at all. With regard to the online review in this case, defamatory speech would not be protected, whereas opinionated speech would be. This Court is not taking a position as to whether a one-star review rises to the level of defamation or whether it is an opinion statement at this time. Rather, Plaintiff should be afforded an opportunity to reasonably develop his case. Upon discovery, the case may or may not survive a motion to dismiss or motion for summary judgment. If the case is not resolved legally with a dispositive motion, the nature of the speech may be a factual question for a jury to decide. Procedurally, it would be premature for this Court to rule as to whether Plaintiff's cause of action survives a motion to dismiss or motion for summary judgment before the identity of the Defendant is known, before Defendant is served with a summons and complaint, and before Defendant has an opportunity to answer.

The Court finds the good faith standard as set out in *In Re Subpoena Deuces Tecum to Am. Online, Inc.* to be most persuasive of the available tests. The Court is satisfied based upon the allegations in the Complaint, taking them to be true, and the Affidavit of Andrew C. Brack

that the Plaintiff has a legitimate, good faith basis for the claim and subpoena. In addition the subpoenaed identity is centrally needed to advance Plaintiff's claim.

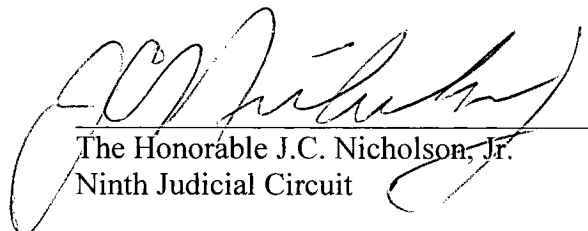
Without the identity of the person who posted the review, there is no known Defendant to answer or file a motion to dismiss or motion for summary judgment. There is no one to argue a genuine issue of material fact exists and no one to provide a counter affidavit. Therefore, based on the good faith standard, Plaintiff has a right to subpoena the requested information to develop his case. Therefore, Plaintiff's Motion to Compel is GRANTED.

The Court does not intend to neglect to protect the First Amendment Right of anonymous internet speakers. Therefore, the identity and information produced by Google is subject to a Protective Order. The information subpoenaed shall be provided to Plaintiff's counsel for the attorney's eyes only. Plaintiff's counsel must obtain court approval before taking further action once John Doe is identified.

F. Injunctive Relief and Sanctions

Plaintiff's request for injunctive relief is moot. Plaintiff's request for costs and attorney's fees associated with this Motion under Rule 37, SCRPC is DENIED because Google's objections are substantially justified.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

August 23, 2017
Charleston, South Carolina