

Docket No. H030099
Santa Clara Co. Super. Court No. CV053609

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JOHN DOE, aka "LASHWR45" on Yahoo!,

Appellant

v.

H.B. FULLER COMPANY

Respondent

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	<i>iii</i>
INTRODUCTION	1
STATEMENT OF THE FACTS	1
STATEMENT OF CASE	5
ISSUE PRESENTED	6
ARGUMENT	6
I. BECAUSE THIS CASE INVOLVES JOHN DOE’S FIRST AMENDMENT RIGHTS, AND BECAUSE THE LOWER COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF, THIS COURT REVIEWS THE TRIAL COURT DECISION <i>DE NOVO</i>	6
II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PLACING THE BURDEN OF PROOF ON DOE INSTEAD OF PLAINTIFF	7
III. THIS COURT SHOULD GRANT DOE’S MOTION TO QUASH BECAUSE FULLER’S EVIDENTIARY SHOWING WAS INSUFFICIENT AS A MATTER OF LAW	10
A. DOE WAS NOT AN EMPLOYEE AT THE TIME OF THE TOWN HALL MEETING	13
B. DOE WAS NOT AT THE TOWN HALL MEETING	14
C. DOE’S POSTINGS CONTAINED NO CONFIDENTIAL INFORMATION	16
D. THE TRIAL COURT COULD NOT HAVE PROPERLY JUDGED WHETHER FULLER HAD MET ITS EVIDENTIARY BURDEN BECAUSE THE COURT NEVER EXAMINED THE TEXT OF DOE’S POSTINGS	16

E.	THE TRIAL COURT ERRED IN DEFERRING TO THE MINNESOTA DISTRICT COURT ORDER BECAUSE DOE'S INTERESTS WERE UNREPRESENTED AT THE HEARING AND THAT COURT MADE NO FACTUAL FINDINGS NOR DID IT APPLY FIRST AMENDED LAW	17
IV.	THIS COURT SHOULD GRANT DOE'S MOTION TO QUASH FULLER'S SUBPOENA BECAUSE THE HARM TO DOE'S FIRST AMENDEDMENT RIGHTS OUTWEIGHTS ANY HARM TO FULLER.....	18
	CONCLUSION.....	20
	CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Highfields Capital Management v. Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2004)	<i>passim</i>
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995).....	18
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	7
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	19

STATE CASES

<i>DVD Copy Control Association, Inc. v. Bunner</i> , 31 Cal. 4th 864 (2003).....	7
<i>DVD Copy Control Association, Inc. v. Bunner</i> , 116 Cal. App. 4th 241 (2004).....	7
<i>Dendrite International v. Doe Number 3</i> , 775 A.2d 756 (N.J. App. Div. 2001)	<i>passim</i>
<i>Doe Number 1 v. Cahill</i> , 884 A.2d 451 (Del. 2005).....	8, 11
<i>Immunomedics, Inc. v. Doe</i> , 775 A.2d 773 (N.J. App. Div. 2001) (CT. at 154).....	11, 13, 16, 17
<i>Magnecomp Corp. v. Athene Co.</i> , 209 Cal. App. 3d 526 (1989).....	19
<i>O'Grady v. Superior Court</i> , 139 Cal. App. 4th 1423 (2006)	6
<i>People v. Louis</i> , 42 Cal. 3d 969 (1986).....	6
<i>Rancho Publications v. Superior Court</i> , 68 Cal. App. 4th 1538 (1999).....	<i>passim</i>

MISCELLANEOUS

<i>Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace</i> , 49 Duke L.J. 855, 895-96.....	19
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Dated: February 14, 2007

Jennifer Stisa Granick
Attorney for Appellant

INTRODUCTION

This appeal is about the legal hurdle a company must surmount before depriving an individual of his First Amendment right to speak anonymously. Plaintiff/Appellee H.B. Fuller Company (Fuller) has alleged that Yahoo! message board postings by Appellant John Doe contain confidential information disclosed to employees at a company meeting, that the posts therefore breach an employee confidentiality agreement, and that Fuller should be able to subpoena Doe's identifying information from Yahoo!. But Fuller has not provided the court with any evidentiary support to warrant the stripping of Doe's anonymity. Fuller relies on the timing of the posts, the company's unsubstantiated assertions that Doe could only have this information if he were an employee and its claims that the information posted was confidential. Contrary to Fuller's claims, Doe was not an employee at the time of the company meeting, nor was he present at that meeting. The information contained in Doe's postings was widely-known and general in nature, and thus no conclusions can be drawn from their timing. By not requiring a more robust evidentiary showing, and instead allowing mere allegation and circumstantial timing to be enough to obtain the identity of an anonymous speaker, the trial court unconstitutionally stripped Doe of his right to speak anonymously.

STATEMENT OF THE FACTS

H.B. Fuller Company is based in Minnesota and manufactures adhesives, sealants, coatings, paints and other specialty chemicals. (Ex. B, Volpi Decl. ¶ 2.)¹ Under the pseudonym "lashwr45," Appellant John Doe

¹ Appellant designated five documents to be included in the records, but the clerk has attested that she cannot locate them. (CT. at 330.) All five documents were filed under seal pursuant to a Jan. 27, 2006 stipulation by the parties. The filed copies of the sealed documents are attached as Exhibits A-E to this Appellants Opening Brief. The stipulation and order sealing those documents is in the Clerk's Transcript (CT) at 46-50. As a result, Appellant feels constrained to file the brief under seal as well. Appellant has contemporaneously filed a Motion to Unseal those documents and this brief.

is one of many members of the public who have visited the Yahoo! message board devoted to Fuller to participate in discussions that include gossip, hyperbole, and opinions. (Mem. P. & A. Supp. Mot. to Quash Subpoena at 3; CT. at 19.)

On November 1, 2005, Doe allegedly posted a message to the Yahoo! message board devoted to H.B. Fuller indicating that //REDACTED//, a fact which the company claims is “confidential information.” (Ex. B, Volpi Decl. ¶ 14.) This posting was made on the same day that H.B. Fuller held a Town Hall Meeting and announced //REDACTED//. (*Id.* ¶¶ 8-10.) On November 3, 2005, Doe posted a second message to the message board //REDACTED//. (Ex. B, Volpi Decl. Ex. C.)

The trial court did not examine the postings to determine that they contained confidential information. The court mistakenly believed that the postings had not been put into the record and then, without any evidence whatsoever, adopted Fuller's raw assertion that the postings contained the very same sensitive information Fuller disclosed at the Town Hall Meeting. (Order Den. Mot. to Quash at 3; CT. at 306.)

Had the trial court viewed the evidence, it would have seen that the postings do not contain confidential information or the //REDACTED// disclosed at the Town Hall Meeting. (Ex. B, Volpi Decl. Ex. B, C.) Fuller does not specify what information announced at the meeting it claims is confidential. (Order Den. Mot. to Quash at 3; CT. at 306.) Nor does it point to specific assertions in Doe's postings that it claims are confidential.

Instead, Fuller only makes general assertions that, at the meeting //REDACTED//. Doe's postings do not contain //REDACTED//. The postings in their entirety were as follows:

//REDACTED//

Rather, the postings, which comprise two short paragraphs in total, state that //REDACTED// (Ex. B, Volpi Decl. Ex. B, C.) Fuller does not explain how the postings possibly could be confidential.

The generality of the postings, including the writer's speculation about //REDACTED//, and the phrase //REDACTED// both point to the fact that the poster was not present at the Town Hall Meeting where these matters were discussed. (Ex. B, Volpi Decl. Ex. C.) Fuller, however, without substantiation, asserts that the *entirety* of its //REDACTED// was completely confidential.

Fuller argues that the timing of the postings means that the writer was at the meetings. That inference is only possibly if the mere fact that the company //REDACTED// was completely and totally confidential. Only then can Fuller claim that reference to //REDACTED// in the postings leads to the conclusion that the writer was an employee who had been present at that Town Hall Meeting. Yet Fuller has provided no evidence that the fact //REDACTED// was confidential.

On the other hand, Doe has provided direct declarations that he had no employment or other relationship with Fuller or its subsidiaries at the time of the Town Hall Meeting other than being a general shareholder of Fuller stock. (Ex. D, Doe Decl. ¶¶ 4, 7.) As such, he was not present at the Town Hall Meeting that day, and did not find out about //REDACTED//. (*Id.* at ¶¶ 8-10) On October 31, 2005, two competitors of Fuller, in two separate conversations, told Doe about the company's //REDACTED//. (*Id.* at ¶ 8) Both competitors referenced other non-employees who had told them //REDACTED//. (*Id.*) One of the competitors also told Doe that //REDACTED//. (*Id.*) After that workday, Doe posted the information that he had learned.

The trial court found that the timing of Doe's messages, posted on the same day as the Town Hall Meeting, demonstrates that there has been a

breach of confidentiality. (Order Den. Mot. to Quash at 4; CT. at 307.) To be successful, Fuller would have to show that the information contained in the postings was kept so confidential that any information relating to it could only have come from an employee present at that meeting. Fuller has no evidence to support that assertion.

Despite the lack of evidence and its failure to review the evidence that existed, the trial court held that this was not a First Amendment case, suggested that the information in Doe's posts was a potential trade secret, and held that Fuller's claim was strong enough to outweigh Doe's First Amendment right to speak anonymously. (Order Den. Mot. to Quash at 5; CT. at 308.)

STATEMENT OF THE CASE

On November 29, 2005, Plaintiff filed a Petition for Commission to Take Out-of-State Deposition, *Duces Tecum*, of Yahoo! Inc. in the State of Minnesota, County of Ramsey. (Mem. P. & A. Supp. Mot. to Quash Subpoena Ex. 2; CT at 27.) The Petition was filed pursuant to Minn.R.Civ.P. 27.01 which, under certain circumstances, allows depositions before an action has been filed. (Mem. P. & A. Supp. Mot. to Quash Subpoena Ex. 1; CT at 25.) Plaintiff does not appear to have complied with Rule 27.01. Doe received no notice of the 27.01 Petition, and Rule 27.01(b) requires at least 20 days advance notice. If notice cannot with due diligence be served, the court may issue an order for service by publication or other means, and must appoint, for persons not served, an attorney to represent them. It does not appear that this has happened. Despite these problems, the Minnesota court signed the Commission the same day Plaintiff filed the Petition. (Mem. P. & A. Supp. Mot. to Quash Subpoena Ex. 3; CT at 35.)

On December 1, 2005, plaintiff served a subpoena upon Yahoo! seeking documents identifying Defendant and postings with any content relating to Plaintiff. (Mem. P. & A. Supp. Mot. to Quash Subpoena Ex. 5; CT at 39.) On December 15, 2005, Defendant filed a Motion to Quash the subpoena. (Mem. P. & A. Supp. Mot. to Quash Subpoena; CT at 14.) The trial court held a hearing on February 10, 2006 and, in an order entered March 15, 2006, denied Defendant's Motion to Quash. (Order Den. Mot. to Quash at 5; CT. at 304.) On April 10, 2006, Doe filed a Notice to Appeal

On April 18, 2006, Fuller applied *ex parte* for an order directing Yahoo! to comply with the March 15th order. At a hearing that day, the judge denied the request since Fuller had not given notice to Doe, and

rescheduled the hearing to give Doe the opportunity to respond. On April 20, 2006, Doe filed his Opposition to H.B. Fuller's Application for an Order Directing Yahoo! to Comply with the Subpoena. The court held a hearing on April 24, 2006, and ordered that Yahoo! comply with the subpoena. That same day, Doe filed a Petition for Writ of Supersedeas and Application for Emergency Stay with this Court and was granted a temporary stay order. On May 9, 2006, Fuller filed its preliminary opposition to Doe's petition. On September 6, 2006, this Court granted the writ of supersedeas and stayed, pending appeal, enforcement of the superior court's order filed on March 15 as well as any enforcement of the subpoena issued to Yahoo! Inc.

ISSUE PRESENTED

Whether the trial court erred in ordering discovery of an anonymous speaker's identifying information where the subpoenaing party failed to produce competent evidence that the speaker had violated a confidentiality agreement or other law and the trial court ruling was based on mere conjecture and allegations.

ARGUMENT

I. Because This Case Involves John Doe's First Amendment Rights, and Because the Lower Court Improperly Shifted the Burden of Proof, This Court Reviews the Trial Court Decision *De Novo*.

In order to adequately safeguard John Doe's constitutionally protected freedom of speech, this court must review the trial court decision *de novo*. Generally, "[q]uestions of law are reviewed under the non-deferential, *de novo* standard." *People v. Louis*, 42 Cal. 3d 969, 985 (1986). Where "a constitutional privilege is implicated," appellate courts must "subject the trial court's order to the relatively searching standards of 'constitutional fact review.'" *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1466 (2006). "[F]acts that are germane to' the First Amendment

analysis ‘must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact.’” *DVD Copy Control Ass’n, Inc. v. Bunner*, 31 Cal. 4th 864, 889 (2003), (internal citations omitted). This Court “must therefore ‘make an independent examination of the entire record’ . . . and determine whether the evidence in the record supports the factual findings necessary” to support the trial court’s order. *Id.* at 890; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), (“We must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.”) (internal quotes omitted). Once it has determined the relevant facts, this Court then independently applies the relevant legal standard to the facts it has found. *See DVD Copy Control Ass’n, Inc. v. Bunner*, 116 Cal. App. 4th 241, 252-56 (2004), (independently determining on remand in a trade secret case that movant had no likelihood of success on the merits and the balance of harms did not weigh in movant’s favor, and therefore the trial court’s grant of preliminary injunction was improper).

II. The Trial Court Committed Reversible Error by Placing the Burden of Proof on Doe Instead of Plaintiff.

In a First Amendment case like this one, the party seeking to destroy the constitutional right has the burden of proof. John Doe seeks the protections of a “qualified constitutional privilege [that] protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret.” *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1547 (1999). Contrary to the trial court’s mischaracterization of this matter as merely a “discovery matter,” (Order Den. Mot. to Quash, Feb. 10, 2006 at 3, 5; CT. at 306, 308), this case implicates the exact set of rights the courts sought to protect in *Rancho Publications* and *Highfields Capital Management v. Doe*,

385 F. Supp. 2d 969 (N.D. Cal. 2004) (quashing on First Amendment grounds a subpoena for an anonymous speaker's identifying information in a trademark case). John Doe has exercised his constitutionally protected right to anonymous speech and the law presumes that this right is protected from civil discovery. Fuller bears the burden of overcoming this presumption. Only if Fuller meets its burden of production and persuasion does Doe's constitutional right yield.

The constitutional rights of speech and privacy trump normal discovery rules. The "nonstatutory qualified immunity, grounded in the free speech and privacy provisions of the United States and California Constitutions, . . . limits what courts can compel through civil discovery." *Id.* at 1547-48. The qualified privilege "presumptively protect[s]" fundamental privacy rights such that, when balancing "the 'compelling' public need to disclose against the confidentiality interests to withhold," a speaker's "fundamental privacy rights" are entitled to "great weight" that forces conventional discovery rules to yield. *Id.* at 1549.

Where a plaintiff seeks discovery of the identity of an anonymous speaker protected by this qualified immunity, the burden of production and persuasion both fall squarely on the plaintiff. In *Rancho Publications*, the California Supreme Court held that the "*party seeking discovery* must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material." *Id.* (emphasis added). Likewise, in *Highfields*, a U.S. District Court in California held that "the first component of the test is a requirement that *the plaintiff* persuade the court that the defendant has engaged in wrongful conduct" before the qualified immunity could be overcome. *Highfields*, 385 F. Supp. 2d at 975 (emphasis added). See also *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) ("[A] defamation *plaintiff* must satisfy a 'summary judgment' standard . . .") (emphasis added); *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760 (N.J. App. Div.

2001) (CT. at 134) (“[T]he plaintiff must produce sufficient evidence . . .”) (emphasis added).

These cases do not distinguish between the burden of production and the burden of persuasion. Both fall on the plaintiff. *Rancho Publications* drew no distinctions between the burden of production and persuasion, holding that the plaintiff had “failed to meet its burden to defeat the qualified constitutional privilege by showing a compelling need to disclose [the identities].” *Rancho Publications*, 68 Cal. App. 4th at 1550. *Highfields* explicitly noted that the test required “that the plaintiff *persuade* the court.” *Highfields*, 385 F. Supp. 2d at 975 (emphasis added).

It appears that the trial court correctly stated that the burden of production fell on Fuller but mistakenly placed the burden of persuasion on Doe. The trial court appeared to recognize that plaintiff has the burden of production under *Rancho* and *Highfields*, (Order Den. Mot. to Quash at 4; CT. at 307) but stated that “the burden of persuading this Court to quash the subpoena is on John Doe.²” (Order Den. Mot. to Quash at 3; CT. at 306.)

Despite properly stating that the burden of production falls on plaintiff, the trial court did not actually require Fuller to meet that burden. The lower court erred in ignoring the most crucial piece of evidence produced by plaintiff, the text of Doe's postings. The plaintiff's allegations that Doe breached an employee confidentiality agreement depend entirely on whether Doe's postings contain confidential information. The court did not examine the text of these postings because the court did not realize that the postings were included in the record. (Order Den. Mot. to Quash at 3; CT. at 306.) The court claimed that “[n]either the specific nature of the confidential material nor the postings themselves are provided to this

² Though the court cited Cal. Code Civ. Proc. §2025.420 to support its belief that the burden was on Doe, (Order Den. Mot. to Quash at 3; CT. at 306), that statute does not address anywhere within its language who bears the burden of proof in a motion for a protective order.

Court.” (Order Den. Mot. to Quash at 3; CT. at 306.) However, the full text of the postings was provided to the court as exhibits in the Volpi declaration. (See Ex. B, Volpi Decl. Ex. B, C.) The trial court could not have properly applied the law if it ignored such a crucial piece of evidence, yet it assumed that Fuller was right despite the lack of evidence. Because the trial court applied the wrong burden of proof and did not require important evidence from the plaintiff, and because Fuller has failed to meet its burden, this court should reverse the trial court and grant Doe’s Motion to Quash Fuller’s Subpoena.

III. This Court Should Grant Doe’s Motion to Quash Because Fuller’s Evidentiary Showing was Insufficient as a Matter of Law.

Fuller failed to meet the standards required to overcome Doe’s qualified immunity because it did not produce any competent evidence that Doe breached a binding confidentiality agreement by posting //REDACTED//. To overcome the qualified immunity, Fuller must produce competent evidence of every element in its breach of contract claim and cannot rely on circumstantial conjecture such as similarities between the subject matter of the meeting and the postings or coincidental timing. Fuller has failed to meet this evidentiary requirement because it cannot produce competent evidence that Doe was an employee at the time of the Town Hall Meeting, that he attended the Town Hall Meeting, or that his postings revealed confidential information in breach of a confidentiality agreement. Therefore, this court must reverse the trial court and grant Doe’s Motion to Quash Fuller’s subpoena.

Courts dealing with online anonymous speech cases have consistently required plaintiffs to set forth competent evidence establishing wrongdoing by the anonymous defendant. The plaintiff must “persuade the court that there is a real evidentiary basis for believing that the defendant

has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff that the laws plaintiff has invoked were intended to protect.” *Highfields*, 385 F. Supp. 2d at 975; *see also Cahill*, 884 A.2d at 460, (“[B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”); *Dendrite*, 775 A.2d at 760 (CT. at 134), (“[T]he 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.”); *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. App. Div. 2001) (CT. at 154).

Mere allegations and rank conjecture alone cannot satisfy the plaintiff’s evidentiary burden. The plaintiff cannot “simply plead and pray,” but must “adduce competent evidence” that “addresses all of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts.” *Highfields*, 385 F. Supp. 2d at 975-76. In *Highfields*, the District Court required the plaintiff to produce evidence of its trademark claim, including that the anonymous party’s postings were commercial and that they were likely to cause confusion in the marketplace, before it would allow the disclosure of the speaker’s identity. *Id.* at 978. These requirements are necessary “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*, 775 A.2d at 771 (CT. at 141).

In *Rancho Publications*, the court rejected plaintiff’s attempts to rely on circumstantial conjecture instead of independently produced evidence. The plaintiff there, a hospital embroiled in controversy, sought discovery of the identities of the authors of anonymous, non-libelous advertorials that

were critical of the hospital. The hospital asserted that the advertorial authors also authored unrelated writings that were the subject of a libel suit. The plaintiff's claim was based on thematic and stylistic similarities between the advertorials and the other allegedly libelous writings. The court rejected this theory, holding that such an "unfounded surmise . . . assumes precisely the answer the challenged discovery seeks to procure." *Rancho Publications*, 68 Cal. App. 4th at 1551. Rather, the *Rancho Publications* plaintiff had to produce independent evidence that the advertorials and the writings at issue were penned by the same people. Because they failed to do so, discovery was denied.

The court in *Dendrite* similarly rejected an inferential leap based on coincidental timing alone. There, plaintiff argued that the defendant's anonymous, allegedly defamatory postings coincided with a drop in Dendrite's stock price, providing sufficient evidence of the harm element of a prima facie case of defamation. The lower court held that a mere coincidence of timing was insufficient evidence to prove a connection between the postings and the stock price drop, and the appellate court affirmed, holding that it "[would] not take the leap to linking messages posted on an Internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock prices *without something more concrete.*" *Dendrite*, 775 A.2d at 769 (CT. at 140) (emphasis in original). Because an assumption based on coincidental timing was insufficient evidence that Dendrite was harmed, the court denied Dendrite's motion to conduct discovery to ascertain the identity of the anonymous poster. *Id.* at 772 (CT. at 142).

In cases involving allegations of a breach of a confidentiality agreement, the proponent of discovery must produce actual evidence that the anonymous speaker was an employee bound by a confidentiality agreement at the time of the posting and that the content of the message

included confidential information. In *Immunomedics*, a plaintiff alleging breach of a confidentiality agreement satisfied its evidentiary burden under *Dendrite* “[w]ith evidence demonstrating Moonshine [the anonymous speaker] is an employee of Immunomedics, that employees execute confidentiality agreements, and the content of Moonshine’s posted messages providing evidence of a breach thereof.” 775 A.2d at 777 (CT. at 157). Immunomedics was able to present to the court an admission by the poster, in her posting, that she was an employee. *Id.* at 774 (CT. at 155). The court also examined the text of the postings themselves to determine whether they had breached the confidentiality agreement. *Id.* at 777 (CT. at 157).

Fuller’s evidence falls well short of that required by *Rancho*, *Dendrite* and *Immunomedics* because Fuller has not and can not establish that Doe is an employee, that he was present at the Town Hall Meeting, or that the content of Doe’s messages contain confidential information.

A. Doe Was Not an Employee at the Time of the Town Hall Meeting.

First, Fuller has adduced no competent evidence that Doe was an employee of Fuller at the time of the postings. In *Immunomedics*, the poster’s admission that she was a “worried employee” constituted competent evidence that satisfied the plaintiff’s evidentiary burden. *Immunomedics*, 775 A.2d at 774 (CT. at 155). Here, Doe has sworn under oath that he is not currently an employee and was not an employee at the time of the postings or the Town Hall meeting. (Ex. D, Doe Decl. ¶ 4.) Doe’s declaration is backed up by Attorney Daniel Taber, who is co-counsel to Doe, has met with Doe, and has sworn that he has read Doe’s declaration and that he “believe[s] the declaration is true and correct as to each matter stated therein.” (Ex. E, Taber Decl. ¶¶ 4, 21.) Fuller has no evidence to the contrary.

B. Doe Was Not at the Town Hall Meeting.

Second, Fuller has failed to produce competent evidence that Doe was present at the Town Hall Meeting where the confidential information was given to employees. Doe swears that he was not present. (Ex. D, Doe Decl. ¶ 4.) Fuller offers two pieces of evidence to support its allegation that Doe was present at the meeting: (1) the timing of the postings and (2) the content of the postings. (Order Den. Mot. to Quash at 4; CT. at 307.) Neither of these establishes Doe's presence at the Town Hall Meeting.

The coincidental timing of Doe's first posting does not establish that Doe was present at the Town Hall Meeting. In *Dendrite*, mere coincidence in timing of the defendant's posting was not competent evidence that the posting caused a drop in stock price. *Dendrite*, 775 A.2d at 772 (CT. at 142). The plaintiff did not show that the drop was caused by the postings rather than other causes the plaintiff did not explore. *Id.* Likewise, here other factors account for Doe posting his message so soon after the company made its announcement in the Town Hall Meeting. //REDACTED// Though trial court believed that the posting's timing was "remarkable" because it happened just hours after the meeting, (Order Den. Mot. to Quash at 4; CT. at 307), Doe made the posting at 7:43pm EST (6:43pm CST), a wholly unremarkable time for someone who likely had to wait until after work hours to explore the Yahoo! message boards. (Ex. B, Volpi Decl. Ex. B.)

Most importantly, the postings could only have been remarkable if they contained confidential information that only employees present at the Town Hall Meeting would have known. If Fuller could point to any statements in Doe's postings that constituted details that only employees present at the meeting could have known, then the timing of the postings might allow an inference that Doe was present at the meeting. However, Fuller has failed to point to any such information. Instead, Fuller relies on

subject matter similarities between the postings and what was discussed at the Town Hall Meeting to prove that Doe must have been present at the meeting. Such thematic similarities were not enough in *Rancho Publications*, even when coupled with the added element of stylistic similarities. Here, these similarities, without more concrete evidence that Doe was present at the meeting, cannot satisfy Fuller's evidentiary burden.

The information Doe posted only includes information already known or observable within Fuller's industry and not the details revealed by Fuller at the Town Hall Meeting. Fuller provided //REDACTED// (Ex. B, Volpi Decl. ¶ 10.) That information included //REDACTED// (*Id.*)

Doe's postings, on the other hand, only contained general information about //REDACTED// and Doe's personal analysis of the situation. The only facts that Doe posted on Nov. 1, 2005 were //REDACTED// (Ex. B, Volpi Decl. Ex. C.) The broad statement about //REDACTED// do not contain the //REDACTED// that Fuller said it revealed at the Town Hall Meeting and claims are confidential. Doe's //REDACTED// language suggests that the information is the sort of rumor that fills the Yahoo! Finance message boards. The rest of the information was already publicly known or observable by those familiar with Fuller. None of these broad, general statements disclose //REDACTED// that only employees could have known.

Fuller's history of //REDACTED//, meant that the information Doe revealed was not known only by employees of Fuller who were present at the Town Hall Meeting. //REDACTED// Such changes could not have been made without those familiar with Fuller knowing about them. //REDACTED// Thus, though //REDACTED//, many, many more people knew about the general information posted by Doe.

To satisfy its evidentiary burden of showing that Doe was an employee, all Fuller had to do was point to some piece of information

posted by Doe that only people present at the Town Hall Meeting could have known. Instead of pointing to specific statements, Fuller broadly states //REDACTED// Fuller knows what it said during the Town Hall Meeting. Fuller knows what Doe posted. Fuller's inability to point to specific information only known by employees present at the meeting must mean that no such information was revealed. Fuller chooses instead to rely on broad allegations that point to no wrongdoing on the part of Doe and cannot justify casting aside Doe's First Amendment rights.

C. Doe's Postings Contained No Confidential Information.

The information posted is not "confidential information" within the terms of Fuller's confidentiality agreement. The confidentiality and non-competition agreements Fuller requires employees to sign define confidential information as information "not generally known and proprietary to Fuller." (Hedberg Decl. Ex. A, B; CT. at 86, 94.) The information Doe posted does not fall within this definition because, as discussed above, it is generally known within the industry.

D. The Trial Court Could Not Have Properly Judged Whether Fuller Had Met Its Evidentiary Burden Because the Court Never Examined the Text of Doe's Postings.

Because the trial court never examined the text of Doe's postings, the trial court's analysis was flawed from the outset and must be reversed. The trial court never realized that the postings were included in the record, instead accepting Fuller's mere allegation that the postings disclosed confidential information. (Order Den. Mot. to Quash at 3; CT. at 306.) Failure to examine the text of the postings means an important factor of the analysis in *Immunomedics* is missing from the trial court's analysis. In *Immunomedics*, the court emphasized the importance of the "content of Moonshine's posted messages" in "providing evidence of the breach [of the confidentiality agreement.]" *Immunomedics*, 775 A.2d at 777 (CT. at 157).

Instead of relying on concrete evidence like the *Immunomedics* court, the trial court relied on allegations in the complaint that “Fuller employees were specifically instructed that information . . . was confidential company information.” (Order Den. Mot. to Quash at 3; CT. at 306.) As is clear from the analysis in the previous sections, the court could not have properly determined whether Doe was present at the Town Hall Meeting or whether Doe had breached the confidentiality agreement without knowing exactly what was included in Doe’s postings. Thus, the trial court committed clear error when it concluded that Fuller had produced evidence that Doe was an employee based on the timing of the postings and that Doe’s postings breached a confidentiality agreement when the court did not even read the postings.

E. The Trial Court Erred in Deferring to the Minnesota District Court Order Because Doe's Interests Were Unrepresented at the Hearing and That Court Made No Factual Findings Nor Did it Apply First Amendment Law.

The trial court erred in deferring to the Minnesota District Court’s order granting the out-of-state deposition of Yahoo!. The issue is not whether Doe showed that “the learned Judge in Minnesota was bamboozled” or whether Doe proved “the legality and propriety of proceedings conducted in [the Minnesota] Courts.” (Order Den. Mot. to Quash at 5; CT. at 308.) Doe had no notice or opportunity to be heard in Minnesota. That court never considered the propriety of Fuller’s claim or the weight of Doe’s First Amendment rights. Instead, the foreign court’s failure to follow Minnesota Rule of Civil Procedure 27 resulted in an unauthorized *ex parte* hearing that prevented the court from making a full and balanced decision. We have no idea whether the Minnesota court heard Fuller’s justifications for discovery or simply signed the proffered order in a ministerial way, but it almost certainly did not make the factual findings

required by *Rancho Publications* and *Highfields*. See section III, supra. The *ex parte* order deserves no weight in this court's or the trial court's analysis.

IV. This Court Should Grant Doe's Motion to Quash Fuller's Subpoena Because the Harm to Doe's First Amendment Rights Outweighs Any Harm to Fuller.

Even if Fuller could adduce competent evidence to support its prima facie case of wrongdoing, Doe's Motion to Quash should still be granted because the balance of harms weighs in favor of Doe. Where plaintiff has met its evidentiary burden, courts still must balance the magnitude of harms before allowing the discovery. See *Highfields*, 385 F. Supp. 2d at 975, ("If reached, the second component of the test requires the court to assess and 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 or defendant."); *Dendrite*, 775 A.2d at 760-61 (CT. at 134), ("Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, 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 identity to allow the plaintiff to properly proceed.").

Here, the harms to Doe's First Amendment rights greatly outweigh the harms to Fuller's rights. Doe's First Amendment right to speak anonymously online is an important and weighty right. The Supreme Court has noted that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Though the "right to remain anonymous may be abused when it shields fraudulent conduct, . . . in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* The right to remain anonymous in

online speech is accorded no less protection. *Reno v. ACLU*, 521 U.S. 844 (1997). In fact, the democratizing force of the internet, which allows anyone with an internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox,” makes the ability to speak freely online even more important in cultivating a healthy and diverse marketplace of ideas. *Id.* at 870. The ease with which speakers can speak anonymously online “removes barriers to being heard” because “the audience must evaluate the speaker’s ideas based on her words alone.” Lyryssa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 895-96. “This unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real-world debate” because it “disguises status indicators such as race, class, gender, ethnicity, and age, which allow elite speakers to dominate real-world discourse.” *Id.* at 896.

Unmasking the identity of online anonymous speakers can cause harm both to the immediate speaker whose identity has been uncovered and also to future anonymous speakers. Once stripped of his anonymity, Doe cannot get it back. He will be made vulnerable to extra-legal retribution by parties who disagree with or object to the content of Doe’s speech. Fear of retribution or social ostracism for expressions of politically or socially unpopular views could also keep future speakers from expressing their views and entering the marketplace of ideas. This chilling effect will dampen the free exchange of ideas and viewpoints and diminish the overall health and vitality of online discourse.

Fuller’s interests here are minimal. While California does have “a strong interest in providing a forum to its residents for causes of action arising from misappropriation of trade secrets,” *Magnecomp Corp. v. Athene Co.*, 209 Cal. App. 3d 526 (1989), this case does not involve trade secrets, theft, or anything else of prevailing importance. Fuller merely

seeks to vindicate an alleged violation of a confidentiality agreement from the disclosure of information already publicly known and available. In fact, since the time of the Town Meeting, Fuller has had to disclose information about //REDACTED// in its filings with the Securities and Exchange Commission, just as Doe's attorney Dan Taber said it would. (Ex. E, Taber Decl. ¶¶ 11-12.) In its 2005 Annual Report (14 Feb 2006) for Fiscal Year ending 3 Dec 2005, available at <http://www.sec.gov/Archives/edgar/data/39368/000119312506031637/d10k.htm>, the company reports //REDACTED//. Doe merely disclosed information that competitors already knew, and because that information is already more widely reported in far more detail, Fuller cannot be harmed by competitors reading about general information on a Yahoo! message board.

When balanced against Doe's weighty constitutional rights to speech and privacy, Fuller's minimal interests must give way. Because this balance favors Doe's First Amendment rights, Doe's identity should not be revealed and the court should grant Doe's Motion to Quash the Subpoena.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's order and grant Doe's Motion to Quash Fuller's subpoena.

Date: February 14, 2007

By: _____

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CERTIFICATE OF COMPLIANCE

I, Jennifer Granick, counsel for Appellant in the instant matter *H.B. Fuller Company v. John Doe, aka "LASHWR45" on Yahoo!*, Case No. H030099, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 8.204(c)(1). The brief contains a total of 6,656 words and was formatted in Times Roman, 13-point typeface.

I declare under the penalty that the foregoing is true and correct.

Dated: February 14, 2007

Respectfully submitted,

Jennifer Stisa Granick
Attorney for Appellant

PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On February 14, 2007, I caused to be served the following documents:

APPELLANT'S OPENING BRIEF

via Federal Express, by placing four (4) true and correct copies of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested party:

Clerk of the Court
State of California
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350 McAllister Street
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and *via* Federal Express, by placing one (1) true copy of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

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PROOF OF SERVICE

Clerk of the Court
Superior Court of California
County of Santa Clara
191 North First Street
San Jose, California 95113

I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of February, 14 2007 at Stanford, California.

Amanda Smith