

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SI03, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. CV 07-6311-EJL
)	
BODYBUILDING.COM, LLC,)	ORDER
)	
Respondent.)	
_____)	

Currently pending before the Court is Plaintiff’s (1) Motion to Compel (Docket No. 6) and (2) Motion to Preserve Electronic Evidence and for Use of Third Party Escrow Company (Docket No. 13). Having carefully reviewed the record, considered oral arguments, and otherwise being fully advised, the Court enters the following Order:

I. INTRODUCTION

A. Factual Background

Plaintiff is a nutraceutical product manufacturer. Pl.’s Memo. in Supp. of Mot. to Compel, p. 2 (Docket No. 6, Att. 2). Relevant to the instant dispute, Plaintiff markets over thirty (30) of its products under the “Syntrax” brand. *Id.*

Respondent hosts and maintains a website serving the interests of the bodybuilding community - www.bodybuilding.com. Opp. to Mot. to Compel, p. 2 (Docket No. 11). As part of its site, Respondent offers an interactive online message board (commonly referred to as “chat

rooms”) that promotes the exchange of questions, comments, endorsements, and criticisms regarding the nutraceutical industry. *Id.*

Since 2006, Plaintiff claims that pseudonymous individuals engaged in a “campaign and conspiracy” to defame and disparage Plaintiff and its Syntrax-brand products on Respondent’s message board. Pl.’s Memo. in Supp. of Mot. to Compel, p. 3 (Docket No. 6, Att. 2). In an apparent effort to protect its reputation against the anonymous “poison pen,” Plaintiff seeks the true identities of twenty-two (22) such individuals from Respondent.

B. Procedural Background

Plaintiff filed the underlying action against John Does 1-30 and Doe Companies 1-5 in the United States District Court for the Northern District of Illinois on June 11, 2007. Complaint (N.D. Ill. Docket No. 1). On June 13, 2007, the Honorable Ruben Castillo dismissed the action without prejudice to the filing of an amended complaint which properly identified the named defendants. Notice of Docket Entry (N.D. Ill. Docket No. 6). Still, at that time, Judge Castillo allowed Plaintiff the opportunity to proceed with expedited discovery “to identify the appropriate defendants and to determine if jurisdiction and venue are appropriate in this district.” *Id.*

On July 27, 2007, Plaintiff served a subpoena upon Respondent, seeking information that would reveal the identities of specific pseudonymous individuals that posted allegedly defamatory statements about Plaintiff and its products on Respondent’s website. Pl.’s Memo. in Supp. of Mot. to Compel, p. 4 (Docket No. 6, Att. 2). Respondent objected, pointing to, among other things, Judge Castillo’s June 13, 2007 dismissal of the original action. *Id.* at p. 5.

Plaintiff issued a second subpoena to Respondent on August 10, 2007, resolving “some minor issues that had been raised” between the parties’ counsel in response to the original July

27, 2007 subpoena. *Id.* Through this second subpoena, Plaintiff sought (1) documents demonstrating the dates and times on which a computer accessed the pseudonymous accounts; (2) documents listing the Internet Protocol (“IP”) addresses associated with the pseudonymous accounts; (3) additional information that had been provided when the pseudonymous accounts were created to identify the individuals using the pseudonymous accounts; and (4) other relevant information. *Id.* Still, Respondent objected, relying upon Judge Castillo’s earlier dismissal. *Id.*

On August 17, 2007, Plaintiff asked Judge Castillo to clarify his June 13, 2007 entry/order. Pl.’s Mot. for Clarification (N.D. Ill. Docket No. 7). Specifically, Plaintiff asked Judge Castillo to allow the issuance of a subpoena upon Respondent, despite its June 13, 2007 dismissal. *Id.* Judge Castillo granted Plaintiff’s request on August 22, 2007, ruling:

Plaintiff may proceed with expedited discovery, including but not limited to subpoenas issued pursuant to Rule 45, to identify the appropriate defendants and to determine if jurisdiction and venue are appropriate in this district, where such discovery may include, but not be limited to, seeking the production of identifying information related to those pseudonyms Plaintiff reasonably believes to be used by the defendants.

Order (N.D. Ill. Docket No. 11). Again, Respondent objected to Plaintiff’s August 10, 2007 subpoena. Pl.’s Memo. in Supp. of Mot. to Compel, p. 6 (Docket No. 6, Att. 2). Plaintiff’s Motion to Compel (Docket No. 6) and Motion to Preserve (Docket No. 13) followed.

II. DISCUSSION

A. Anonymous Internet Postings and the First Amendment

Going “online” means that a person, frequently using a pseudonym to conceal his/her identity, views or transmits information, participates in live chat rooms, conducts consumer transactions, or (as is the case here) posts to message boards - all while keeping his/her identity a

secret from the rest of the world. See Antonia L. Hamblin, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 Hofstra Lab. & Emp. L.J. 383, 384 (2003).

Peter Steiner forecasted this reality in his now-iconic cartoon :



In short, Internet anonymity lets one transcend the limitations of the flesh, making it “desirable for the persecuted, controversial, and the simply embarrassed.” *Id.* (citing Patrick Weston, III. First Amendment: 2. Internet Crime Status: b) Fraud: *American Civil Liberties Union of Georgia v. Miller*, 14 Berkeley Tech. L.J. 403, 409 (1999)).

There is no doubt that the First Amendment protects the right to speak anonymously. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999); *Talley v. California*, 362 U.S. 60, 65 (1960). These principles have been extended to protect anonymous speech on the Internet. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 845 & 870 (1997) (There is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the

¹ Peter Steiner’s cartoon first appeared in the *New Yorker* on July 5, 1993 and is reproduced in compliance with the copyright laws of the United States.

Internet].”); *see also Sony Music Entm’t v. Does*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004). Still, the First Amendment does not protect defamatory speech - regardless of whether such speech is posted anonymously over the Internet or uttered in public. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (“It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”) Thus, on the issue of disclosing a speaker’s identity, courts are forced to balance the protected right of a person to speak anonymously against another person’s right to protect their reputation. *Doe v. Cahill*, 884 A.2d 451, 456-57 (Del. 2005)

This balance is a delicate one. On the one hand, there is the potential chilling effect on the legitimate expression of an individual’s First Amendment right to speak anonymously. If Internet speakers knew they could be exposed by mere *allegations* of wrongdoing, they may be intimidated to the point of self-censoring their speech or, worse, not speaking at all. *Id.*²

On the other hand, those who are the subject of anonymously-posted rumors, insults, overheated rhetoric, and/or outright lies must be able to protect their business and personal reputations. This may involve not only responding to such postings in a rehabilitative sense, but, under appropriate circumstances, also removing the cloak of anonymity from Internet message

² *See also Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (“People 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.”); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“If Internet users could be stripped of . . . 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. Therefore, discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts.”)

boards to target the offending “cybersmearer” and stop such conduct. It is the confluence of these factors that frequently requires the courts’ involvement to resolve.

Increasingly, the target of disparaging comments respond by filing lawsuits against various unknown “John Doe” defendants, claiming, among other things, libel, misappropriation of trade secrets, breach of confidentiality agreements, or violation of securities laws. In these lawsuits, subpoenas are issued to the message board hosts in an effort to obtain identifying information about the authors. Because companies can abuse the subpoena power to silence legitimate speech, courts have had to determine when it is appropriate to order an Internet Service Provider (“ISP”) to disclose the identity of the author behind an anonymous posting.

B. Ordering Disclosure of a Poster’s Identity

While the parties to this action seem to agree on the application of the First Amendment to anonymous speech over the Internet (*see* Opp. to Mot. to Compel, p. 9 n. 32 (Docket No. 11)), they appear to disagree on the appropriate standard to be applied toward disclosing an anonymous poster’s identity.³ Respondent favors the approach outlined in *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001); Plaintiff endorses the rationale in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Opp. to Mot. to Compel, pp. 4-6 (Docket No. 11); Mem. in Supp. of Mot. to Compel, pp. 9-10 (Docket No. 6, Att. 2).

In *Dendrite*, the plaintiff filed suit against numerous anonymous individuals, alleging that postings on a Yahoo message board were libelous as to the publicly-traded corporation. Specifically, the plaintiff sought discovery of the identities of all the defendants who accused the

³ Although the parties’ briefing highlighted a disagreement regarding the appropriate standard to be applied, oral argument seemed to reveal that any disagreement was more in form rather than substance (*see infra* at p. 8).

plaintiff of artificially inflating earnings reports and accused the plaintiff's president of wanting to sell the company but was finding no takers. The trial court granted the plaintiff's motion to conduct limited discovery to ascertain the identities of certain defendants, but denied the motion as to other defendants. The plaintiff appealed the trial court's denial as to John Doe No. 3 only.

On appeal, the intermediate New Jersey appellate court outlined four requirements that had to be met before a plaintiff could pierce the veil of anonymity with respect to anonymous postings on an Internet message board: (1) the plaintiff must attempt to notify the anonymous poster by posting a notice in the forum where the offending comment was made, that a disclosure of his or her identity is being sought; (2) the plaintiff must identify the specific statements that are allegedly actionable; (3) the plaintiff must proffer evidence supporting each element it would have to establish to prove its claim; and (4) the court must balance the anonymous poster's First Amendment right of anonymous free speech against the strength of the plaintiff's case and the necessity of the disclosure to allow plaintiff to proceed. Focusing on the third requirement, the appellate court affirmed the lower court's decision, finding that the plaintiff failed to establish that it was harmed by John Doe No. 3's statement because the company's stock value had not decreased in value following the allegedly injurious statements.

Six years later, in *Cahill*, the plaintiffs sued four anonymous Internet users, alleging that statements posted by the users on a website operated by the Delaware State News were libelous. The plaintiffs obtained an order from a Delaware trial court to compel the ISP of one of the defendants to reveal this defendant's identity. After being notified of the order, the defendant filed an emergency motion for protective order, seeking to prevent the ISP from revealing his/her identity. The court denied this motion.

On appeal, the Delaware Supreme Court reasoned that, in order to obtain discovery of an anonymous defendant's identity in a libel case, a plaintiff must submit sufficient evidence to create a genuine issue of material fact on each element of the libel claim – in other words, a plaintiff must offer enough evidence to survive summary judgment. The Delaware Supreme Court therefore retained the first and third elements of the *Dendrite* test, concluding that the second and fourth elements are already “subsumed” in the summary judgment inquiry. Applying this “modified *Dendrite* standard,” the Court reversed the trial court, finding that no reasonable person could construe the statements as anything other than protected expressions of opinion.

Although *Cahill* collapses two of the *Dendrite* elements into the more elevated summary judgment inquiry, *Cahill* essentially adopts the *Dendrite* standard and, likewise, its First Amendment protections. Accordingly, under *Cahill*, a court may order the disclosure of an anonymous poster's identity if a plaintiff: (1) makes reasonable efforts to notify the defendant of a subpoena or application for an order of disclosure; and (2) demonstrates that it would survive a summary judgment motion. *Id.* at 461. In addition to these two *Cahill* factors, both parties seem to endorse the inclusion of a balancing test reminiscent of *Dendrite*. *See* 1/29/08 Tr. at pp. 30, 34, & 67 (Docket No. 37). This modified standard will be applied here. *See, e.g., Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712 (Ariz. Ct. App. 2007).

C. Applying the Disclosure Standard to Plaintiff's Subpoena

Through its August 10, 2007 subpoena, Plaintiff seeks to identify approximately twenty-two (22) individuals who pseudonymously posted information critical of Plaintiff and its products on Respondent's Internet website. Preliminarily, in response to Respondent's objection to Plaintiff's Motion, the Court is tasked with examining the subpoena to determine, among

other things, the reasonableness of the subpoena and whether it subjects Respondent to “undue burden.” *See* Fed. R. Civ. P. 45(c)(3)(A)(iv). The determination of a subpoena’s reasonableness requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it; this balance of the subpoena’s benefits and burdens calls upon the court to consider whether the information is both necessary and unavailable from any other source. *See* 9A Fed. Prac. & Proc. Civ.2d § 2463.1.

According to Plaintiff, the purpose of this action and the at-issue subpoena is “to determine the identities of those defendants that have consistently and methodically defamed it and its products over a significant period of time.” Pl.’s Mem. in Supp. of Mot. to Compel, p. 2 (Docket No. 6, Att. 2). However, Plaintiff concedes (and has identified) that, of the twenty-two (22) pseudonyms, at least ten (10) belong to specific individuals who are “representatives” of/for Plaintiff’s competitors. *See* 10/19/07 Aff. of Greg Davis, ¶¶ 17-24 (Docket No. 6, Att. 5) (“At least eight of the pseudonyms sought in the subpoena served on Bodybuilding.com . . . have identified themselves as representatives of SI03’s competitors.”)⁴

In other words, there appear to be no less than ten (10) individuals associated with six (6) known competitors who contributed to the allegedly defamatory content. Therefore, independent

⁴ For example, “‘Aeternitatis’ is a representative for Molecular Nutrition.” *See* 10/19/07 Aff. of Greg Davis, ¶ 19 (Docket No. 6, Att. 5). “‘Androgenic’ and ‘dwm230000’ are representatives for MAN Sports.” *Id.* at ¶ 20. “‘Bloute’ is a representative for Serious Nutrition Solutions.” *Id.* at ¶ 21. “‘CanadaBBoy’ and ‘Dito’ are representatives for Thermolife.” *Id.* at ¶ 22. “‘Nathan518 and ‘uhockey’ are representatives for Designer Supplements.” *Id.* at ¶ 23. Further, although not listed by Plaintiff, “getbusted” also appears to be a representative for Molecular Nutrition. *See* 10/19/07 Aff. of Greg Davis, ¶ 18 at Ex. E-16 (Docket No. 6, Att. 7). Likewise, “Deserusan” appears to be employed by Gaspari Nutrition - also SI03’s competitor. *Id.* at ¶ 11 at Ex. E-9. Therefore ten (10) individuals appear to be affiliated in some way with six known competitors.

of the constitutional issues woven throughout this action, it would seem that, procedurally speaking, Plaintiff is capable of either naming these specific competitors as defendants in the underlying action or, alternatively, reaching out to these same competitors for information relating to their representatives' identities.⁵ Further identifying information as to these ten (10) pseudonyms should not be the responsibility of Respondent when such information is presumably available from other, more direct sources.

The remaining twelve (12) individuals, then, are the proper subjects of Plaintiff's August 10, 2007 subpoena. These individuals operate under the following pseudonyms: "aoba," "BuckeyeMuscle," "chimpilico," "cxm," "ElMariachi," "EMISGOD," "Ephedra," "Flagg3," "INGENIUM," "jkeithc82," "Rob W," and "Seth25."

1. Did Plaintiff Provide Adequate Notice to the Pseudonymous Internet Posters in Question?

By endorsing the modified *Cahill* standard, Plaintiff recognizes its burden to provide notice of the August 10, 2007 subpoena to the pseudonymous Internet posters in question. Plaintiff concedes that it did not provide such notice. *See* 1/29/08 Tr. at p. 22 (Docket No. 37). Instead, Plaintiff seems to rely on its belief that Respondent "took it upon itself to inform its forum members of SI03's Complaint and the subpoenas issued upon Bodybuilding.com." Pl.'s Mem. in Supp. of Mot. to Compel, p. 10, fn. 2 (Docket No. 6, Att. 2).

⁵ Plaintiff claims that "no other party exists from which SI03 can obtain the information." Pl.'s Reply Mem. in Supp. of Mot. to Compel, p. 8 (Docket No. 29). Yet, Plaintiff fails to explain why the competitors who are/were known to be associated with these ten (10) individuals are incapable of identifying them. Plaintiff's counsel's concern that such individuals may just be "fan[s] of the [competitor] company" (*see* 1/29/08 Tr. at p. 74 (Docket No. 37)) are presumably alleviated when Plaintiff itself has identified these individuals as "representatives" of its competitors, not mere "fans." Indeed, it would seem that these competing entities are best equipped to provide the information that Plaintiff now seeks.

However, L. Gary Davis, Respondent's Chief Financial Officer and Vice President, disagrees. In particular, as to the above-referenced belief that Respondent sufficiently notified the pseudonymous Internet posters of the August 10, 2007 subpoena, Mr. Davis states in no uncertain terms: "This statement is false, as neither notice of the Complaint nor the Subpoenas was made by Bodybuilding.com to its Forum members." 11/15/07 Dec. of L. Gary Davis, ¶ 11 (Docket No. 11, Att. 2) (Emphasis in original).

Plaintiff does not respond to Mr. Davis' retort, except to state that the balance of comments on the website about the lawsuit/subpoena sufficiently satisfied the notice statement. *See* 1/29/08 Tr. at pp. 68 & 72 (Docket No. 37).⁶ Plaintiff also cites to *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008), in support of this position. *Id.* 159 Cal. App. 4th at 1171 ("[W]hen ISPs and message-board sponsors . . . themselves notify the defendant that disclosure of his or her identity is sought, notification by the plaintiff should not be necessary.") However, this argument is problematic for at least two reasons. First, while it may be true that certain forum members discussed the lawsuit and/or subpoena *ad nauseam* on

⁶ During oral argument, Plaintiff's counsel stated:

I acknowledge that there is a requirement, and by the time that the subpoena was issued, notice had been provided on the website. I mean I have copies here today of [forum members] listing all the pseudonyms at issue. The people on the forums identifying which of the pseudonyms were associated with competitors themselves, discussions about the claims and the complaint. I mean there are pages and pages of discussions on the forum, including some of the very people at issue here, talking about the lawsuit, more than Tillery and I have even talked about the lawsuit. So looking at that, there's an argument – we believe that notice had – I mean they had notice.

See 1/29/08 Tr. at p. 72 (Docket No. 37).

Respondent's website, Plaintiff points to no evidence in the record suggesting that such is the case. Moreover, it cannot be said that each pseudonymous user participated in these discussions. Second, and perhaps more importantly, the rationale in *Krinsky* was bolstered by the fact that it was a pseudonymous Internet poster who moved to quash the subpoena, presumably allaying any concern that he was not provided with appropriate notice. *Id.* ("Obviously Doe 6 has already learned of the subpoena or he would not be seeking protection.") That is not what happened here. Here, Respondent objected to Plaintiff's subpoena - not any one of the pseudonymous Internet posters who Plaintiff seeks to identify. Respondent's counsel does not represent these posters individually or as a group. *See* 1/29/08 Tr. at p. 42 (Docket No. 37). As a result, *Krinsky* does not squarely apply, leaving the notice requirement intact and, without more, unfulfilled.

Still, within Respondent's briefing, reference is made to a July 9, 2007 posting from an "SI03 Board Rep" that stated:

we are not going after the average consumer. We are only interested in people affiliated with other supplement companies. We are not trying to infringe on first amendment rights; the average consumer that is unaffiliated has every right to speak his or her opinion within reason.

Opp. to Mot. to Compel, pp. 14-15 (Docket No. 11). Thus, it appears that *some* form of notice was made to the forum users with respect to the underlying action and/or the subpoenas issued upon Respondent. However, that same "notice" does not clearly notify the specific anonymous posters that the disclosure of their respective identities is sought as contemplated by both *Dendrite* and *Cahill*. Plaintiff does not argue otherwise. Only through a strained application of this preliminary element to the parties' conduct can it be considered that Plaintiff provided adequate notice to the pseudonymous Internet posters in question.

Therefore, Plaintiff neither (1) responds to Mr. Davis's rebuttal, (2) contends it satisfied the requisite notice requirement, nor (3) supports its claim that Respondent satisfied the notice requirement. Combined, it cannot be said that this necessary element toward revealing an unknown Internet poster's identity is satisfied. For this reason, Plaintiff's Motion to Compel must be denied at this time. However, recognizing the very real possibility that Plaintiff will later renew its Motion to Compel, the Court finds it necessary (and hopefully helpful) to briefly comment on the nature of the allegedly defamatory postings within the context of the relevant disclosure standard.

2. Has Plaintiff Satisfied the Motion for Summary Judgment Standard as to Each Pseudonymous Internet User in Question?

a. *Summary Judgment Standard*

In reviewing a motion for summary judgment, a court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The burden imposed on the nonmovant is not a heavy one; the nonmoving party is simply required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. *Dark v. Curry County*, 451 F.3d 1078, 1082, n. 2 (9th Cir. 2006) (citing 10A Wright, Miller & Kane, Federal Practice and Procedure, Civil 3d § 2727 (1998)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “[I]f a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.” *T.W. Elec. Serv., Inc.*, 809 F.2d at 631; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

b. *Illinois' Defamation Standard*

According to the Illinois Supreme Court, a statement is defamatory if it “tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [him/her/it].” *Bryson v. News Am. Publ'ns, Inc.*, 174 Ill.2d 77, 87 (Ill. 1996).⁷ “To state a defamation claim, a plaintiff must present facts [establishing] that defendant made a false statement about the plaintiff, that defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages.” *See Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill.2d 558, 579 (Ill. 2006).

Illinois courts consider several factors in determining whether a particular statement is actionable: (1) whether the statement has a precise core of meaning; (2) whether the statement is objectively verifiable; (3) whether the literary context of the statement implies that it has factual content; and (4) whether the broader social context in which the statement appears implies fact or opinion. *Brennan v. Kadner*, 351 Ill. App.3d 963, 969 (Ill. App. Ct. 2004); *Moriarty v. Greene*, 315 Ill. App.3d 225, 235 (Ill. App. Ct. 2000). Courts evaluate the totality of the circumstances in each case, but the emphasis is on whether the statement is capable of objective verification. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 367 Ill. App. 3d 48, 53 (Ill. App. Ct. 2006). The determination of whether a particular statement is actionable is a matter of law for courts to decide. *Hopewell v. Vitullo*, 299 Ill. App.3d 513, 518 (Ill. App. Ct. 1998).

⁷ Statements may be considered defamatory *per se* or defamatory *per quod*. *Kolegas v. Heftel Broad. Corp.*, 154 Ill.2d 1, 10 (Ill. 1992). A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation is presumed. *Owen v. Carr*, 113 Ill.2d 273, 277 (Ill. 1986). In a defamation *per quod* action, damage to the plaintiff's reputation is not presumed; rather, the plaintiff must plead and prove special damages to recover. *Bryson v. News America Publ'ns, Inc.*, 174 Ill. 2d 77, 103 (Ill. 1996).

c. *Application of the Defamation Standard to Allegedly Defamatory Statements Within Internet Postings*

It should be understood that Internet blogs, message boards, and chat rooms are, by their nature, typically casual expressions of opinion. *Cahill*, 884 A.2d at 465. Several courts make this observation when applying distinct (but nonetheless similar) defamation standards to Internet postings.

For example, in *Global Telemedia Int'l v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001), the plaintiff sued thirty-five (35) anonymous internet message board posters for libel and interference with contractual relations based on less-than-flattering postings critical of the plaintiff and its management practices. There, the court recognized that “[u]nlike many traditional media, there are no controls on the [Internet] postings. Literally anyone who has access to the Internet has access to the chat-rooms.” *Id.* at 1264. Later, in granting the defendants’ motion to strike, the court concluded that “the general tenor, the setting and the format of [the posters’] statements strongly suggest that the postings are opinion. 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 [the plaintiff].” *Id.* at 1267. As to the allegedly defamatory comments themselves, the court looked to their overall context, commenting: “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.” *Id.* Therefore, in light of the postings’ exaggeration, figurative speech, colorful language, and broad generalities the court found that the “reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the defendant]

was airing anything other than his personal views” *Id.* at 1268. In short, the court found that defendants’ postings were not defamatory as a matter of law.

Similarly, in *SPX Corp. v. Doe*, 253 F. Supp. 2d 974 (N.D. Ohio 2003), a publicly traded corporation brought a defamation action against an individual who had allegedly posted false statements on an Internet message board maintained by Yahoo! Inc. *Id.* at 976. The challenged statements warned investors of forthcoming investigations of the corporation by the FBI and the SEC and advised investors to sell the corporation’s stock. *Id.* at 976-77. Dismissing the action, the court concluded that the challenged statements were protected opinion because:

[T]he tenor of the postings is not consistent with professional investment advice. In describing the [p]laintiff, the [d]efendant uses the term “TIMBER!!!!”, clearly a figurative hyperbole. He also describes the Plaintiff as having “shit businesses and cooking the books”, hardly the language of reliable investment advice. Even his screen name, “neutronb”, diminishes his credibility. In context, a reasonable reader would view the statements as the author’s subjective characterizations, and not as reliable facts .

Statements appearing in such locations as forum and commentary newspaper sections, or other venues often associated with “cajoling, invective, and hyperbole”, are more likely opinion. Here, the [d]efendant’s statements were posted on an Internet message board. Such message boards are accessible to any [] one of the tens of millions of people in this country (and more abroad) with Internet access, an[d] no one exerts control over the content. Pseudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as “facts” when placed on such an open and uncontrolled forum.

Id. at 981 (Citations omitted). With this free-for-all-type backdrop, the court found that the defendant’s comments were not defamatory under Ohio law; in doing so, the court granted the defendant’s motion to dismiss the plaintiff’s defamation claim with prejudice.

Again, in *Rocker Mgmt. LLC v. John Does*, 2003 WL 22149380 (N.D. Cal. 2003), the plaintiff investment management firm subpoenaed a third-party ISP to obtain information identifying anonymous Internet posters critical of the plaintiff. *Id.* at *1. In its underlying libel claim, the plaintiff accused the defendant of stating on a Yahoo! message board that the plaintiff “‘threaten[s] analyst[s] who are bullish on certain stocks’ and of spreading lies ‘about those stocks’” as well as stating that the plaintiff “is the subject of a Securities and Exchange Commission investigation.” *Id.* Addressing the question of whether the defendant’s postings were libelous, the court examined the “‘totality of the circumstances’ in which the statement was made.” *Id.* at *2 (Citations omitted). Armed with this standard, the court commented:

[The defendant’s] statements were made in an Internet chat room in which anyone can post a message and most messages are posted anonymously. Each Yahoo message board contains a warning that the messages posted “are solely the opinion and responsibility of the poster” The messages are replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole. For example, plaintiff itself, through its principal Mark Chodes, responded on one message board: “DISRESPECT ... EVERYONE GETS WHAT THEY DESERVE ... MAY YOU EAT CAT FOOD UNDER A BRIDGE. You lowlifes.” The screen names used by the posters sued by plaintiff include “m a r c _ c o h o d e s _ a n a l _ w a r t s ,” “marc_chodes_ate_a_terd_sandwich,” “mr_know_it_all_analist,” and “lawyers are all satans children.” In this context, readers are unlikely to view messages posted anonymously as assertions of fact.

Id. (Spelling and capitalizations in original; citations omitted). The court concluded that the context of the defendant’s statements reveal non-libelous expressions of opinion rather than actionable statements of fact and, as a result, quashed the subpoena. *Id.* at *3.

More recently, in *Cahill* itself, a town council member and his wife brought a defamation action against four (4) John Doe defendants based on anonymous statements posted on an

Internet weblog, inferring the plaintiff's mental deterioration, paranoia, and homosexuality. *Cahill*, 884 A.2d at 454 & 466-67. As previously discussed (*see supra* at 7-8), the plaintiff sought to compel the disclosure of the defendants' identity from a third party that had the information. *Id.* Considering the first element of a defamation claim under Delaware law - whether the alleged defamatory statements are expressions of fact or protected expressions of opinion - the court looked to the context in which the statements were made and found that "no reasonable person could have interpreted these statements as being anything other than opinion." *Id.* at 467. ("Given the context of the statement and the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs, this is the only supportable conclusion. Read in the context of an Internet blog, these statement did not imply any assertions of underlying objective facts.") Further, the fact that other posters responded in disagreement to the defendants' allegedly defamatory statements indicated to the court that the offending comments were "no more than unfounded and unconvincing opinion." *Id.*⁸ These factors contributed to the

⁸ Consistent with this finding, the court highlighted the Internet's unique ability to contemporaneously respond to offending comments to the same audience, using the same medium:

Besides the legal remedies available to a plaintiff wronged by internet defamation, the potential plaintiff has available a very powerful form of extrajudicial relief. The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight.

Id. at 464.

court reversing the lower court's decision and remanding the action with instructions to dismiss the plaintiff's claim with prejudice. *Id.* at 468.

Although not binding, these cases are persuasive to some extent because of their factual similarities to this action. It is in the milieu created by this authority that the twelve (12) pseudonymous Internet posters' comments must be discussed.

Certainly, some of the postings at issue contain comments that are so "over-the-top" that a reasonable reader will not interpret them to be objectively verifiable statements of fact. That is, in the context of Internet postings and the casual dialogue that typically accompanies such "cyber-smackdowns," name-calling, hyperbole, and, generally, juvenile behavior is not unusual; indeed, it is not only expected at times, but often encouraged. In this type of setting, as here, a reasonable reader would view a poster's use of the words "shill," "shady," and "rotten egg protein," for example, as the author's critical opinion and not as reliable facts.⁹ Further, as is the case here, where a poster finds it necessary to share with the public the following: "After using

⁹ Additionally, it should be recognized that, like *Cahill*, there are other postings within this same queue of postings defending Syntrax's Swole V3 product; in fact, aoba's allegedly defamatory posting was a response to a query that concluded with: "am I the only one who's been around long enough to know what great products this company has contributed to the industry?" See 10/19/07 Aff. of Greg Davis, ¶ 5, Ex. E-3 (Docket No. 6, Att. 7).

Moreover, curiosity led to an independent visit to the bodybuilding.com message board. During this visit, it became clear that the pseudonym "BiggJohn" (who participates in many of the postings included within Plaintiff's briefing) is affiliated in some way with Plaintiff. In an unrelated exchange, BiggJohn responds to another poster with the comment: "Thermolife shill." Another time, BiggJohn responds to a post by saying: "Beware of pimps like Uhockey." Although not part of the record, and without addressing the potential defamatory nature of these exchanges, they support the notion that Internet message boards are understood to be a fora for opinionated conversation, not to be confused with reliable and credible news media outlets. Arguably, this type of opinion volleying on an Internet message board should not be understood as actionable expressions of fact.

‘Java Lather’ on my shaved ballz, it’s not t-bagging anymore!!!,” it cannot be said that such commentary shares a level of objective credibility that brings with it actionable conduct. From the Court’s position, such sophomoric postings are made in jest and should not be taken as statements of fact to the casual reader entering a web site to read, participate in, and be entertained by whatever subject is being discussed.¹⁰ Plaintiff’s counsel appeared to share the importance of considering context when viewing the allegedly defamatory postings, stating during oral argument:

Some pseudonymous communications, sure. Should the average person pay attention to it, probably not, depending on the merit So in answer to the court’s question, some communications an average [reader] probably shouldn’t pay any attention to it if it’s pseudonymous or anonymous. That’s my perspective. Will average consumers reading that information follow that? I don’t know.

See 1/29/08 Tr. at pp. 26 & 27 (Docket No. 37). Therefore, without commenting on whether the specific statements made by the twelve (12) pseudonymous posters are defamatory, the context of such statements is important. Such statements cannot be considered in a vacuum.

¹⁰ When recently analyzing comments posted over the Internet within First Amendment parameters, the California Court of Appeals recently noted in *Krinsky v. Doe 6*:

[The statements] fall into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, constitute protected opinion under the First Amendment. It hardly need be said that this conclusion should not be interpreted to condone Doe 6’s rude and childish posts; indeed, his intemperate, insulting, and often disgusting remarks understandably offended plaintiff and possibly many other readers. Nevertheless, ““the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”” [Citations.]”

Krinsky, 159 Cal. App. 4th 1154, 1178 (Cal. Ct. App. 2008) (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)).

While the Court doubts that the reasonable reader will confuse Respondent's message board for the *Wall Street Journal*, context alone should not protect *all* allegedly defamatory statements. For instance, comments that suggest a product "kill[s]/ruins peoples' livers," "killed a few people," "caused the death of people" and "endanger peoples' lives" is admittedly more problematic and more of a concern to the Court when triaging the allegedly defamatory statements. This perspective is likewise shared by counsel for both Plaintiff and Defendant. *See* 1/29/08 Tr. at pp. 31-32, 37, 44-47 (Docket No. 37). Yet, as mentioned above, such statements should not be considered in isolation, but must, instead, be considered in the appropriate context and tenor as well.

Originally, the Court was prepared to contrast the allegedly defamatory statements posted on Respondent's message board against the applicable disclosure standard in order to resolve the Plaintiff's Motion to Compel. To that end, the Court developed a matrix of all the pseudonymous posters and their respective comments to help determine the extent of any disclosure. However, it would seem careless at this juncture to critique each posters' statements when the preliminary notice requirement is lacking.¹¹ To be sure, the Court's initial concern over certain statements and the related possibility of a defamation determination appropriately prevents an adjudication of the issue absent notice to the potentially-affected parties. These same individuals should be given the opportunity to appear and object to Plaintiff's Motion to

¹¹ Respondent's counsel logically proposes that the Court forgo the notice requirement as to those statements that are clearly not defamatory. *See* 1/29/08 Tr. at p. 79 (Docket No. 37). Doing so, however, would suggest that the remaining comments are (or could be) actionable. Such a quasi-ruling may detriment an unrepresented party who neither received notice nor objected to Plaintiff's Motion to Compel. Absent notice and the possibility of corresponding representation, the Court is not prepared to accept such an invitation.

Compel efforts if they so choose; to date, however, that has not happened. Notwithstanding its preliminary impressions (*see supra* at pp. 18-20), the Court must reserve its rulings on the specific statements themselves until then.

D. Plaintiff's Motion to Preserve Electronic Evidence (Docket No. 13).

The denial of Plaintiff's Motion to Compel (Docket No. 6) largely renders Plaintiff's Motion to Preserve Electronic Evidence (Docket No. 13) moot. That is, Respondent need not submit the requested information to either a third-party escrow company or to the Court for an *in camera* inspection when such information will not be compelled at this time. Having said this, Plaintiff's request that Respondent *preserve* certain information is not extinguished with the resolution of its Motion to Compel. Within its moving papers, Plaintiff specifically seeks to preserve the sought-after information "pending the resolution of the above-captioned action and any appeal that may emanate therefrom." Mot. to Pres. Elect. Info., p. 1 (Docket No. 13). At this stage, it seems prudent to grant Plaintiff's request that Respondent continue to preserve the requested information until this action is complete. The requested/preserved information, however, does not need to be submitted to a third-party or the Court at this time. Given its apparent cooperation in agreeing to preserve the requested information thus far, this limited ruling does not prejudice Respondent.

III. ORDER

In accordance with the foregoing, and the Court being fully advised in the premises, IT IS HEREBY ORDERED that Plaintiff's Motion to Compel (Docket No. 6) be DENIED without prejudice. On or before May 9, 2008, Plaintiff must notify the twelve (12) anonymous posters in the forum where the allegedly offending comments were made that a disclosure of their identities

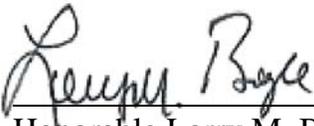
is sought via a subpoena. To ensure that any objections are brought to the Court's attention, Plaintiff's notice should reference the jurisdiction in which the subpoena is issued, the case number, and the opportunity to object formally by May 30, 2008. If, as of May 30, 2008, one or more of the anonymous posters objects to the disclosure, the Court will take up the issue on Plaintiff's renewed Motion to Compel, if any, followed by a hearing, if necessary, to accommodate the interests of the objecting parties.

If, as of May 30, 2008, there are no objections, the Plaintiff is permitted to renew its Motion to Compel. Following the briefing on any renewed Motion to Compel, the Court is not inclined to conduct a second hearing and anticipates ruling on the parties' respective submissions.

Plaintiff's Motion to Preserve Electronic Evidence and for Use of Third Party Escrow Company (Docket No. 13) is GRANTED only insofar as Respondent must continue to preserve the requested information until the resolution of this action. In the meantime, Respondent need not submit the requested information to either a third-party escrow company or the Court for an *in camera* inspection.



DATED: **May 1, 2008.**



Honorable Larry M. Boyle
Chief U. S. Magistrate Judge