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6	IN THE UNITED STATES DISTRICT COURT	
7	FOR THE DISTRICT OF ARIZONA	
8	Best Western International, Inc., a non- profit Arizona corporation) No. CV-06-1537-PHX-DGC
9	Plaintiff,	ORDER
10		
11	vs. John Doe, et al.,	
12	Defendants.	
13)
14	Plaintiff Best Western International, Inc. ("BWI") has filed this action against various	
15	John Doe Defendants. BWI claims that the Defendants have posted anonymous messages	
16	on an Internet site that defame BWI, breach contracts with BWI, breach fiduciary duties,	
17	reveal confidential information, infringe BWI trademarks, and constitute unfair competition.	
18	Because the Internet messages have been posted anonymously, BWI has been unable to	
19	identify the John Doe Defendants.	
20	BWI has filed a motion to conduct accelerated and expedited discovery. Doc. #5.	
21	The motion seeks permission to serve subpoenas on various Internet Service Providers	
22	("ISPs") and others before an initial conference is held pursuant to Rule 26(f) of the Federal	
23	Rules of Civil Procedure. The subpoenas seek disclosure of the identities of the sponsor for	
24	the Internet site as well as individuals who have posted messages. BWI contends that such	
25	information is needed before the John Doe Defendants can be served with BWI's complaint	
26	and can participate in a Rule 26(f) conference. Alleging that it is suffering irreparable injury	
27	as a result of comments posted on the site, BWI seeks expedited discovery and expedited	
28	consideration of its motion to conduct the discovery. Doc. #6.	

BWI also asks the Court to issue an order requiring the preservation of evidence
 related to the identities of the John Doe Defendants. Doc. #7. BWI notes that information
 concerning Internet users typically is retained for only a short period of time. BWI asks the
 Court to enter an order requiring the preservation of information until it can be obtained
 through discovery.

One of BWI's proposed subpoenas would be directed to H. James Dial. Mr. Dial has
appeared through counsel, identified himself as one of the John Doe Defendants, and filed
an opposition to BWI's motion for discovery and a counter-motion to stay all discovery until
completion of a Rule 26(f) conference. Doc. #11. BWI has filed a response. Doc. #17.

This order will address four issues: (1) whether BWI has shown good cause to conduct discovery in advance of a Rule 26(f) conference, (2) whether this Court has jurisdiction to rule on the propriety of BWI's proposed subpoenas, (3) what showing BWI must make in order to conduct discovery that implicates First Amendment rights of the John Doe Defendants, and whether BWI has made that showing, and (4) other relevant considerations.

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1. Good Cause.

Rule 26(d) provides that "a party may not seek discovery from any source before the
parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d). The rule makes
clear, however, that this limitation can be overridden by court order. *Id.* An order permitting
discovery before a Rule 26(f) conference may be issued for "good cause." *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001).

BWI has satisfied the good cause requirement. BWI has established by affidavit that it is unable to identify the John Doe Defendants by means other than the subpoenas. Doc. #9. Although Mr. Dial volunteered that he is one of the John Doe Defendants, the action is brought against an apparently large number of individuals who have posted anonymous messages on the Internet site. The case cannot proceed and a Rule 26(f) conference cannot be held until these Defendants are identified.

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In addition, courts have recognized that ISPs typically retain user information for only

a limited period, ranging from a few days to a few months. *UMG Recordings, Inc. v. Does I-IV*, No. 06-0652 SBA (EMC), 2006 WL1343597, at *1 (N.D. Cal. Mar. 6, 2006). The loss
 of evidence seems particularly possible in this case, as the Internet site expressly states to
 users that "your identity will be totally and forever withheld *and destroyed*." Doc. #5, Ex.
 A at 2 (emphasis added).

Because the identities of the John Doe Defendants is necessary for this case to proceed
and there is reason to believe that those identities may be lost if discovery is delayed, the
Court concludes that BWI has established good cause to conduct discovery before the Rule
26(f) conference. This conclusion does not, however, answer the question of whether
discovery should be permitted in light of the First Amendment rights of the John Doe
Defendants. That issue will be addressed below.

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2. The Court's Jurisdiction to Address the First Amendment Question.

BWI's proposed subpoenas to ISPs and other individuals will be issued by federal district courts in the jurisdictions where those entities and individuals reside. Because only the court issuing a subpoena generally has power to quash it, BWI argues that this Court has no jurisdiction to address the propriety of the subpoenas.

17 Rule 45(c) does provide that subpoenas should be enforced by the district court which 18 issued them, but this rule "does not alter the broader concept that the district court in which 19 an action is pending has the right and responsibility to control the broad outline of discovery." Static Control Components, Inc. v. Darkprint Imaging, 201 F.R.D. 431, 434 20 21 (M.D.N.C. 2001). General discovery issues should receive uniform treatment throughout the 22 litigation, regardless of where the discovery is pursued. Courts have also recognized that a 23 party's "'discovery rights [in other districts] can rise no higher than their level in the district 24 of trial." Id. (quoting Fincher v. Keller Indus., Inc., 129 F.R.D. 123, 125 (M.D.N.C. 1990)).

The First Amendment implications of BWI's proposed discovery constitutes a significant issue in this case. Not only are the First Amendment rights of fundamental importance to the John Doe Defendants, but they also will be preserved or defeated by discovery orders. To the extent that Defendants have a First Amendment right to anonymous speech (a right addressed below), the right will be lost if BWI is permitted to learn the
 speakers' identities through discovery. This right will be at issue in every district where
 BWI's subpoenas are served. It makes little sense to leave such a central issue to district-by district determination.

5 The Court concludes that it can and should address the First Amendment issues raised
6 by BWI's discovery motion. As the court noted in *Static Control*, "[t]his issue extends well
7 beyond the matter of a specific subpoena." *Id.* at 434 n.5.

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3. First Amendment Considerations.

BWI is a non-profit member corporation. Doc. #3 at ¶ 9. BWI's members own and
operate more than 4,000 hotels and lodging properties under the BWI name and trademark. *Id.* at ¶ 10. BWI's board of directors communicates with BWI members through regional
governors who are appointed to oversee specific geographic districts. *Id.* at ¶ 11.

BWI's complaint and motions say little about the content of the Internet messages at issue in this case. Mr. Dial asserts, however, that the Internet site was created as a place for BWI members and governors to state their views on various issues concerning BWI. Specifically, Dial asserts that recent proposed changes in BWI's method of operation have drawn extensive comment on the site. The site describes itself as a "site for Best Western members," where members and headquarters staff "can exchange information on a 100% confidential basis." Doc. 5, Ex. A.

20 Several First Amendment principles are relevant.

21 First, the Amendment protects anonymous speech. See Buckley v. Am. Constitutional 22 Law Found., 525 U.S. 182, 200 (1999). The Supreme Court has noted that "[a]nonymity is 23 a shield from the tyranny of the majority." McIntyre v. Ohio Elections Comm'n, 514 U.S. 24 334, 357 (1995). Indeed, "[u]nder our Constitution, anonymous pamphleteering is not a 25 pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." Id. 26 Second, the protections of the First Amendment extend to the Internet. See Reno v. 27 ACLU, 521 U.S. 844, 870 (1997). "Courts have recognized the Internet as a valuable forum 28 for robust exchange and debate." Sony Music Entm't, Inc. v. Does 1-40, 326 F. Supp. 2d

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556, 562 (S.D.N.Y. 2004). "Through the use of chat rooms, any person with a phone line can
become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 870. Courts also recognize that anonymity is a particularly important
component of Internet speech. "Internet anonymity facilitates the rich, diverse, and far
ranging exchange of ideas [;]... the constitutional rights of Internet users, including the First
Amendment right to speak anonymously, must be carefully safeguarded." *Doe v. 2 The Mart.com, Inc.*, 140 F. Supp. 2d 1088, 1092, 1097 (W.D. Wash. 2001).

8 Third, "courts have held that civil subpoenas seeking information regarding
9 anonymous individuals raise First Amendment concerns." *Sony*, 326 F. Supp. 2d at 563
10 (*citing NAACP v. Ala. Ex Rel Patterson*, 357 U.S. 449, 462 (1958); *NLRB v. Midland Daily*11 *News*, 151 F.3d 472, 475 (6th Cir. 1998); *L.A. Mem'l Coliseum, Comm'n v. Nat'l Football*12 *League*, 89 F.R.D. 489, 494-95 (C.D. Cal. 1981)).

13 Fourth, the right to speak anonymously is not absolute. See McIntyre, 514 U.S. at 14 353; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 59, 555-56 (1985) (First 15 Amendment does not protect copyright infringement); Doe v. Cahill, 884 A.2d 451, 456 16 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are 17 entitled to no constitutional protection."). "Those who suffer damages as a result of tortious 18 or other actionable communications on the Internet should be able to seek appropriate redress 19 by preventing the wrongdoers from hiding behind an illusory shield of purported First 20 Amendment rights." In re Subpoena Duces Tecum to America On-Line, Inc., No. 40570, 21 2000 WL1210372, at *5 (Va. Cir. Ct. Jan. 31, 2000).

These principles make clear that the John Doe Defendants have a First Amendment right to anonymous Internet speech, but that the right is not absolute and must be weighed against BWI's need for discovery to redress alleged wrongs. To ensure that the First Amendment rights of anonymous Internet speakers are not lost unnecessarily, courts typically require parties to make some showing before obtaining discovery of the speakers' identities. Courts have recognized a range of possible showings. As the Delaware Supreme Court has explained, "an entire spectrum of 'standards' . . . could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to
 survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a
 motion for summary judgment and, beyond that, hurdles even more stringent." *Cahill*, 884
 A.2d at 457. BWI urges the Court to adopt the lowest standard – good faith. Dial suggests
 the more stringent summary judgment standard.

6 In deciding which standard to apply, the Court must consider the significance of the 7 First Amendment rights at issue in this case. BWI cites several cases in which plaintiffs sued 8 defendants for illegally downloading music from the Internet. Although the courts found that 9 the downloading of information was entitled to some protection under the First Amendment, 10 they recognized that downloading was not purely expressive and therefore was entitled only 11 to "limited" First Amendment protection. Sony, 326 F. Supp. 2d at 564; UMG Recordings, 2006 WL1343597 at *1 ("A person who uses the Internet to download or distribute 12 copyrighted music without permission is engaging in the exercise of speech, but only to a 13 14 limited extent[.]").

The conduct of the John Doe Defendants, by contrast, is purely expressive. The
Defendants are expressing their views on issues of interest to BWI members and governors
in a forum specifically designed for an exchange of opinions and ideas anonymously. Such
speech is entitled to substantial First Amendment protection.

19 Given the significant First Amendment interest at stake, the Court agrees with the 20 Delaware Supreme Court in *Cahill*, and concludes that a summary judgment standard should 21 be satisfied before BWI can discover the identities of the John Doe Defendants. The court 22 in *Cahill* described the test in these words: "Before a defamation plaintiff can obtain the 23 identity of an anonymous defendant through the compulsory discovery process, he must 24 support his defamation claim with facts sufficient to defeat a summary judgment motion." 25 884 A.2d at 460. This standard does not require a plaintiff to prove its case as a matter of 26 undisputed fact, but instead to produce evidence sufficient to establish the plaintiff's prima 27 *facie* case:

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[T]o obtain discovery of an anonymous defendant's identity under the

summary judgment standard, a defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question. In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within plaintiff's control.

Id. at 465 (quotations and citations omitted, emphasis in original). The emphasized words "within plaintiff's control" recognize that a plaintiff at an early stage of the litigation may not possess information about the role played by particular defendants or other evidence that normally would be obtained through discovery. But a plaintiff must produce such evidence as it has to establish a *prima facie* case of the claims asserted in its complaint.

BWI's complaint provides an example of why the summary judgment standard is 10 appropriate. The complaint alleges that Defendants have improperly posted confidential BWI information on the Internet site, wrongfully posted BWI's trademark on the site, used 12 BWI's equipment to communicate with the site, deprived BWI of the benefits of its contract 13 with Defendants, and made false statements regarding BWI and its business. Doc. #3 ¶¶ 14 58-60, 64, 68. But BWI's complaint does not identify a single false statement allegedly 15 made by the John Doe Defendants, identify a single item of confidential information posted 16 on the site by Defendants, describe a single instance where BWI's mark was improperly 17 used, explain how BWI was denied the benefits of its contracts, or explain how BWI 18 equipment was improperly used. The complaint provides no factual support for BWI's claim 19 that Defendants engaged in wrongful conduct not protected by the First Amendment. 20

At the same time, the Court finds no basis for concluding that BWI's complaint has been asserted in bad faith. Nor, given modern notice pleading standards, would BWI's complaint likely be subject to a motion to dismiss. Thus, if the standard for permitting discovery of the John Doe Defendants' identities required only good faith or the ability to survive a motion to dismiss, BWI's proposed discovery would be permitted and the Defendants' First Amendment right to anonymous speech would be defeated. A good faith allegation of wrongdoing, devoid of factual detail, would suffice.

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The Court concludes that more is needed before a defendant's First Amendment rights

may be eliminated. The Court must examine facts and evidence before concluding that a
 defendant's constitutional rights must surrender to a plaintiff's discovery needs. The
 summary judgment standard will ensure that the Court receives such facts and evidence.

4 Other courts have adopted a multi-part test for determining when plaintiffs should be 5 permitted to discover the identity of anonymous defendants. This test includes "(1) a 6 concrete showing of a *prima facie* claim of actionable harm; (2) the specificity of the 7 discovery request; (3) the absence of alternative means to obtain the subpoenaed information; 8 (4) a central need for the subpoenaed information to advance the claim; and (5) the Doe 9 defendants' expectation of privacy." UMG, 2006 WL1343597 at *1 (citing Sony, 326 F. 10 Supp. 2d at 564-65). The Court views the first element of this test – "a concrete showing of 11 a prima facie claim" – as equivalent to the summary judgment standard. See Dendrite Int'l., 12 Inc. v. Doe, 775 A.2d 756, 760 (N.J. App. 2001) ("[T]he plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a 13 14 court ordering the disclosure of the identity of the unnamed defendant."). The Court need 15 not address parts (2)-(4) of this test, as they clearly have been established by BWI. The fifth 16 part of the test – the John Doe Defendants' expectation of privacy – should be addressed in 17 the briefing by the parties discussed below.

In summary, BWI has not made a sufficient showing to justify discovery that will
disclose the identities of the John Doe Defendants. BWI may be able to make such a
showing in a renewed motion, but it has not done so in the present motion. The Court
therefore will deny BWI's motion for expedited discovery.

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4. Other Considerations.

If BWI believes that it can satisfy the summary judgment standard, it may seek to do so in a renewed motion to be filed with the Court on or before **August 18, 2006**. In the meantime, the Court will issue BWI's requested motion regarding the preservation of documents. As noted above, there is reason to believe that the information sought by BWI will not be retained by the ISPs or others from whom BWI will seek discovery. The Court will enter BWI's proposed order to preserve such evidence. The Court notes that Mr. Dial

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1 did not oppose the entry of such an order.

BWI has asked the Court to require the host of the Internet site to post the preservation
order on the site. The Court finds such a requirement unnecessary. BWI may itself make the
existence of the order known through its own entry on the site. BWI may also send copies
of the preservation order to those from whom it later will seek discovery if the summary
judgment standard is satisfied.

If BWI attempts to satisfy the summary judgment standard, BWI should give notice
to the John Doe Defendants over the Internet site and afford them an opportunity to oppose
the discovery. "When First Amendment interests are at stake, we disfavor *ex parte* discovery
requests that afford the Plaintiff the important form of relief that comes from unmasking an
anonymous defendant." *Cahill*, 884 A.2d at 461. Therefore, "the plaintiff must undertake
reasonable efforts to notify the anonymous defendant of the discovery request and must
withhold action to allow the defendant an opportunity to respond." *Id*.

14 BWI shall notify the anticipated recipients of its discovery requests, as well as the 15 John Doe Defendants, through entries on the Internet site and other reasonable means, that 16 it is seeking discovery of the Defendants' identities and that the potential discovery recipients 17 and John Doe Defendants may respond to its motion, should they choose to do so, within 18 three weeks of the motion's filing. Because the Court will enter BWI's requested order for 19 preservation of documents, evidence should not be lost while these steps are undertaken. 20 Upon receipt of any responses to BWI's renewed motion and the filing of BWI's reply, the 21 Court will again address the question of whether discovery of the John Doe Defendants' 22 identities should be permitted in this case.

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IT IS ORDERED:

BWI's motion for expedited consideration of motion to conduct accelerated
 and expedited discovery (Doc. #6) is granted.

26 2. BWI's motion to conduct accelerated and expedited discovery (Doc. #5) is
27 denied.

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3. BWI's motion for expedited consideration of motion for order regarding

1	preservation of documents (Doc. #8) is granted.
2	4. BWI's motion for order regarding preservation of documents (Doc. #7) is
3	granted. The Court will enter BWI's proposed order separately.
4	5. H. James Dial's motion to stay all discovery pending resolution of this motion
5	and Rule 26(f) conference (Doc. #11) is granted to the extent that no discovery will occur
6	until after the Court considers BWI's renewed motion for discovery, but is denied to the
7	extent that Mr. Dial seeks a stay of all discovery until a Rule 26(f) conference has occurred.
8	DATED this 25 th day of July, 2006.
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10	Danuel G. Campbell
11	David G. Campbell United States District Judge
12	United States District Judge
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