IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROCKER MANAGEMENT LLC,

Plaintiff,

v.

JOHN DOES 1 THROUGH 20,

Defendants.
_____/

No. MISC 03-0033 CRB

MEMORANDUM AND ORDER

Plaintiff Rocker Management LLC, a New Jersey investment management firm, filed this diversity action in New Jersey federal court charging 15 "John Doe" defendants with libel. The claims arise from statements made by anonymous posters on Yahoo! Inc. ("Yahoo") message boards, otherwise known as "chat rooms." Plaintiff served a subpoena on Yahoo seeking the disclosure of the identity of two of the posters, including the poster known by the screen name "harry3866" ("harry").

Now pending before the Court is harry's motion to quash the Yahoo subpoena. Harry contends that plaintiff has not demonstrated that harry made any libelous statements. After carefully considering the papers and evidence filed by the parties, and having had the benefit of oral argument, the Court agrees and GRANTS harry's motion to quash.

THE ALLEGEDLY LIBELOUS STATEMENTS

Yahoo sponsors "message boards" for publicly traded companies. Anyone with access to the Internet can post a message to a particular board or respond to an earlier-posted

message. See Dendrite International, Inc. v. John Doe No. 3, 342 N.J. Super 134, 143 (App.Div. 2001). Most messages are posted anonymously; the person posting the message is identified only by his chosen screen name. See id.

In its claim for business libel, plaintiff accuses harry of stating on a Yahoo message board that plaintiff "'threaten[s] analyst[s] who are bullish on certain stocks' and of spreading lies 'about those stocks" as well as stating that plaintiff "is the subject of a Securities and Exchange Commission investigation." First Amended Complaint ¶ 10. In its opposition to the motion to quash, plaintiff submitted copies of several messages posted by harry on a message board for the corporation Take-Two Interactive Software, Inc. Plaintiff contends these messages are actionable, although it does not identify what precisely in each message it contends constitutes libel. See Opposition at 9.

DISCUSSION

As a general rule, "discovery proceedings take place only after the defendant has been served." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 576 (N.D. Cal. 1999). As the Seescandy.com court noted, however, the Internet has created "the ability to commit certain tortious acts, such as defamation, . . . entirely on-line." Id.

> In such cases the traditional reluctance for permitting filings against John Doe defendants . . . and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously.

Id. The court set forth four requirements for pre-service discovery. Only one of those requirements is at issue on harry's motion to quash: the plaintiff must "establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss." Id. at 579. "[P]laintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." Id.

The critical question, then, is whether harry's postings are libelous. Harry contends that his postings, when viewed in context, are mere opinion rather than actionable statements of fact. "Pure opinions--'those that do not imply facts capable of being proved true or false'

--are protected by the First Amendment." Nicosia v. De Rooy, 72 F.Supp.2d 1093, 1101 (N.D. Cal. 1999) (citing Partington v. Bugliosi, 56 F.3d 1147, 1153 n.10 (9th Cir. 1995)). "Whether a statement is an assertion of fact or opinion is a question of law for the court." Id.

"To determine whether an alleged defamatory statement implies a factual assertion, [courts] examine the 'totality of the circumstances' in which the statement was made." Rodriguez v. Panayiotou, 314 F.3d 979, 986 (9th Cir. 2002). Courts "look at the statement both 'in its broad context,' considering 'the general tenor of the entire work, the subject of the statements, the setting, and the format of the work,' and in its 'specific context,' noting the 'content of the statements,' the 'extent of figurative or hyperbolic language used,'and 'the reasonable expectations of the audience in that particular situation.'" Id. (internal citation omitted). The "court must place itself in the position of the . . . reader, and determine the sense of meaning of the statement according to its natural and popular construction" and the "natural and probable effect [it would have] upon the mind of the average reader." Id. (citations and internal quotations omitted). Finally, courts "inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false." Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995).

Harry'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," and that the opinions "are no substitute for your own research, and should not be relied upon for trading or any other purpose." 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:

"marc_cohodes_anal_warts," "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. See Global Telemedia Intern., Inc. v. Doe 1, 132 F.Supp.2d 1261, 1267 (C.D. Cal. 2001).

The specific context and content of harry's messages also suggest to the reader that his messages are statements of opinion rather than fact. Harry's messages are free flowing diatribes; he does not use proper spelling, grammar or capitalization. For example, on January 20, 2003, he wrote about plaintiff:

> there is a lot more two it.ITS BASIC MANIPULATION 101,They float rumors,lies and half truths everywere they can,they have posters,theycall the company and ask people if they are quitting.They even go so far as to threaten analyst who are bullish,telling them they will never work the street again.This is just a small part of it....."

(spelling, spacing, capitalization in original). A couple of weeks later harry wrote:

> Looks like there is trouble brewing at rocker partners.Even jjs friendship with spitzer,was of no help.Well its not as if I did not warn chohodes that people were responding to my calls and letters.And this is just the start.I hope and pray chohodes goes to jail.Tell him I said hello and that his raiders are losers like him.Lets get those orange jumpsuits ready .....

February 2, 2003 message (spelling, spacing, capitalization in original).

Finally, and perhaps most fatal to plaintiff's claim against harry, plaintiff has not even attempted to show that harry's statements are "sufficiently factual to be susceptible of being proved true or false." Underwager, 65 F.3d at 366. Plaintiff has not bothered to identify the specific statements it contends are libelous; instead, it attached the complete copy of several messages to its opposition to the motion to quash. The Court is left to guess exactly what statements plaintiff contends are libelous statements of fact. Moreover, plaintiff has not alleged that any of the statements are false.

The snippets of statements plaintiff briefly identified in its complaint are not capable of being proved false. For example, harry stated that the "sec is sniffing around rocker partners,and asking questions." January 31, 2003 message. Plaintiff does not explain how it would prove such a statement is false: what does "sniffing around" mean? Harry's statements are simply too vague and hyperbolic to constitute actionable libel. See Nicosia, 72 F.Supp.2d at 1104.

CONCLUSION

Based on the totality of the circumstances, the Court concludes that plaintiff has not demonstrated that harry libeled plaintiff in the Yahoo chat room. The Court is not ruling that a person cannot commit libel on the Internet; rather, plaintiff has not identified any specific statement which, in the context it is made, would be viewed by a reasonable reader as a defamatory statement of fact. Accordingly, harry's motion to quash is GRANTED.

IT IS SO ORDERED.

Dated: May 28, 2003

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE