UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-21221-CIV-ALTONAGA/BROWN

RENEE BLASZKOWSKI, *et al.*,
individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

MARS, INCORPORATED, *et al.*,

Defendants.
_____/

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL DOCUMENTS AND INTERROGATORY ANSWERS REGARDING PET FOOD COMMUNICATIONS

Plaintiffs seek to withhold from Defendants among the most basic and important of discovery materials requested under Fed. R. Civ. P. 34: their own writings about the matters at issue in this case. Before filing and during the pendency of this action, which alleges false advertising in the sale of pet food and resulting harm to pets, Plaintiffs have published extensive communications about those products and their pets, and they have done so in public forums. These communications are relevant to a number of issues – among others, (i) Plaintiffs' allegations that they were misled by false advertising, and (ii) the extent to which individualized issues such as each Plaintiff's knowledge of pet food constituents renders the case inappropriate for class treatment. Despite the relevance of these communications to this case, Plaintiffs have refused to provide Defendants with these communications or the identifiers they used while engaging in such discussions online. Because *some* of Plaintiffs' writings were published under

online pseudonyms, Plaintiffs contend that the First Amendment and their rights of privacy entitle them to withhold *all* of their communications about this case from discovery.

Plaintiffs' objections to this discovery lack merit. Having initiated a lawsuit that places directly at issue their perceptions of and reliance on pet food advertising as well as the health of their pets, Plaintiffs may not shield communications bearing on those issues from discovery. The relevance of the communications to the issues at hand easily trumps the First Amendment interests at stake. And quite apart from the anonymous postings that Plaintiffs have made, there is no First Amendment or privacy objection whatever to Defendants' requests for non-anonymous communications. For these reasons, Defendants' motion to compel should be granted. Moreover, in light of the fact that Plaintiffs' depositions are scheduled to begin in early August (according to a schedule to which Plaintiffs initially agreed and which Defendants are now seeking to enforce by separate motion filed this same date), Defendants request resolution of this motion to compel at the soonest practicable time.

BACKGROUND

Plaintiffs, who seek to represent a putative class of pet food consumers, allege that Defendants have falsely advertised the safety and nutritional content of the pet food products they manufacture. Plaintiffs also allege that those pet food products have harmed their pets. Discovery in this matter commenced in April 2008. On April 16, 2008, Defendants Mars Incorporated ("Mars") and Natura Pet Products, Inc. ("Natura"), each served Plaintiffs with their First Sets of Interrogatories. See, e.g., Ex. 1 (Mars' Interrogatories); Ex. 2 (Natura's Interrogatories). On the same date, Defendants jointly served their First Set of Requests for the Production of Documents. See, e.g., Ex. 3. In accordance with the parties' agreement, Plaintiffs

served their written objections to this discovery on June 30, 2008. See, e.g., Ex. 4 (Plaintiff Blaszkowski's response to Defendants' Requests for Production of Documents).

Plaintiffs have published hundreds, if not thousands, of writings about this case in forums entitled, for example, "Florida Pet Food Lawsuit Forum," "Nationwide Class Action for Misleading Consumers Forum," "Industry Talk re what the Defendants are Planning Forum," and "You may not have been getting that Expensive Lamb Pet Food you were Paying for Forum." See, e.g., "Florida Pet Food Lawsuit," Itchmo Forums for Cats & Dogs, http://itchmoforums.com/law-and-politics-about-pets/florida-pet-food-lawsuit-t4404.0.html (last visited July 21, 2008). These writings, many of which are publicly accessible, include detailed discussions of issues specifically related to Plaintiffs' allegations in this case, such as communications regarding the content and allegedly deceptive nature of pet food advertisements at issue, the types and brands of pet food that Plaintiffs feed their pets, the symptoms and suspected causes of illnesses suffered by their pets — including specific brands of pet food (manufactured by certain Defendants) Plaintiffs believe contributed to their pets' illness, and general attitudes Plaintiffs hold toward Defendants. Some Plaintiffs even refer in these writings to tests conducted and evidence preserved for purposes of this lawsuit. Others discuss their pets' habits of eating potentially harmful materials — such as rodents and feces — apart from their consumption of pet food.

These communications reflect Plaintiffs' understanding of both the public nature of their postings and their relevance to this case. Periodically, Plaintiffs are cautioned online to be more careful about the content of their postings so as not to "give away details on plaintiff strategy" to "the defendants" who may be "watching these boards." See Posting of "JustMe" to Itchmo Forums for Cats & Dogs, http://itchmoforums.com/law-and-politics-about-

pets/suggestion-re-lawsuits-t883.0.html (June 16, 2007, 04:59:40 AM). Examples of some of Plaintiffs' postings are included in Exhibit 5. While many Plaintiffs publish pseudonymously, some post under their real names, such as Ann Quinn, who writes "Careless pet food manufacturers entered my home and murdered all three of my cats in December, 2006," Posting of Ann Quinn to Itchmo Forums for Cats & Dogs, http://www.itchmo.com/petition-to-require-pet-food-companies-to-be-held-financially-liable-for-pet-deaths-190/comment-page-90/#comment-33029 (July 6, 2007, 01:01 PM), or Tone Gaglione, who states, "Fancy Feast killed my cat, she was only 8 yrs. old. Nestle Purina admitted fault, and I have a letter to prove it." Posting of Tone Gaglione to About.com: Cats, http://cats.about.com/b/2007/03/22/pet-food-recall-creates-anger-fear-and-distrust-in-the-pet-food-industry.htm (Mar. 22, 2007). One Plaintiff, Susan Peters, maintains a website devoted exclusively to pet food safety entitled "AskSusanPeters," http://hubpages.com/author/AskSusanPeters/latest/, which contains, *inter alia*, in-depth discussions about specific products at issue here.

Some of Plaintiffs' postings related to pet food and pet food quality predate the filing of this lawsuit. "Donna," for example, wrote nearly a month before initiation of this action, "thank you, ITCHMO, for this site. You have afforded a great service to all of us. I am grateful that you have allowed me to share my concern, emotions, fears and story with you and others while this terrible pet food debacle continues to unfold." Posting of "Donna" to Itchmo Forums for Cats & Dogs, http://itchmoforums.com/profiles/donna-u58.html;sa,showPosts;start,345 (Apr. 13, 2007, 06:25:15).

Defendants have requested that Plaintiffs produce all such communications, as well as disclose their associated pseudonyms, so that Defendants may be able to match the online commentary with its author in preparation for Plaintiffs' depositions and in connection with

upcoming proceedings to determine whether this case should be certified as a class action. Plaintiffs have refused entirely, claiming such disclosures would invade their privacy rights and their First Amendment rights to anonymous speech.[1]

ARGUMENT

I. Plaintiffs Should Produce the Documents Requested in Request Nos. 20, 22, and 23.

A. Defendants' Requests for Production

Defendants served the following Requests for Production of Documents on each Plaintiff:

> 20. All documents pertaining to any communication you sent or received, directly or indirectly, regarding pet food during the last five (5) years, including letters or newsletters.
>
> 22. All documents pertaining to any electronic communication you sent or received, directly or indirectly, regarding pet food during the last five (5) years, including emails and postings on websites, weblogs, electronic bulletin boards, or other electronic media.
>
> 23. A copy of all web sites, weblogs, electronic bulletin boards or other electronic media maintained in whole or in part by you, including any past or archived information during the last five (5) years, which in any way pertain to pet food.

B. Plaintiffs' Objections

Plaintiffs' objections to these document requests are identical in all material respects for purposes of this motion. It is Defendants' understanding after conferring with Plaintiffs' counsel that Plaintiffs intend to stand on their objections to these requests. They have raised identical First Amendment arguments to each request. Pursuant to Local Rule 26.1.H.2, Defendants reproduce Plaintiffs' First Amendment objection verbatim here:

[1] The parties remain engaged in discussions regarding certain other discovery requests served by Defendants on Plaintiffs. Plaintiffs have indicated that further clarification is forthcoming with respect to their responses to those requests. See Ex. 6.

This request is also objectionable to the extent that it infringes on the Plaintiffs' First Amendment right to anonymous free speech for all communications made anonymously on the Internet or in any other written communication. The First Amendment to the United States Constitution provides that "Congress shall make no law... abridging the freedom of speech." U.S. CONST. amend. I. It is a long-standing principle that anonymity plays an important role in free speech and expression and, accordingly, constitutional principles are invoked whenever a threat to that anonymity is posed such as the request at issue. Indeed, the right to speak anonymously or pseudonymously has its roots in a long tradition of American political thinkers who published their works anonymously. James Madison, Alexander Hamilton, and John Jay authored the Federalist Papers under the name "Publius," referring to a defender of the ancient Roman Republic. Dawn C. Nunziato, Freedom of Expression, Democratic Norms, and Internet Governance, 52 Emory L.J. 187,252 n.250 (2003). "It has been asserted that, between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressman published anonymous political writings." Jennifer B. Wieland, Note: Death of Publius: Toward a World Without Anonymous Speech, 17 J.L. & POL. 589, 592 (2001) (relying on Comment, The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil, 70 YALE L.J. 1084 (1961)).

The seminal case articulating the constitutionally protected privacy interests of an anonymous speaker is the 1995 Supreme Court case of McIntyre v Ohio Elections Commission, 514 U.S. 334 (1995). There, the central issue was whether an Ohio statute, which prohibited the distribution of anonymous campaign literature, violated an individual's free speech rights to distribute anonymous pamphlets opposing a school tax levy. The Court found, that regarding issues of public concern, anonymous speech is protected under the First Amendment. The Court declared that Ohio could not "seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." McIntyre, 514 U.S. at 357. See also Talley v. California, 362 U.S. 60, 65 (1960) (anonymous pamphlets seeking boycotts of allegedly racially discriminatory businesses); Church of the Am. Knights of the Ku Klux Klan v. Kerik, 232 F.Supp.2d 205 (S.D.N.Y. 2002) (right to wear masks at KKK rally).

Two years later, the Supreme Court applied the principle of constitutionally protected anonymous speech to internet postings in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). The protection of anonymity takes on added significance on the Internet, a medium which provides individuals with unprecedented opportunities to both publish and receive information. While the expressive powers of the Internet have long been understood by its users, the medium's potential attained recognized constitutional status only in 1997. In ACLU v. Reno, the Supreme Court reviewed the Communications Decency Act, the first federal statute seeking to regulate Internet content. In a landmark decision defining the scope of the online medium's First Amendment protection, the Court noted that the Internet

> *provides relatively unlimited, low-cost capacity for communication of all kinds ...this dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. 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. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.*

521 U.S. at 870. The Court concluded that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id. What the Court described as "the vast democratic fora of the Internet" would be stifled if users were unable to preserve their anonymity online. Id. at 868. The courts have long recognized that compelled identification can chill expression.

In Reno, the Court was asked to review the constitutionality of the Communications Decency Act provisions seeking to protect minors from harmful material on the Internet. In that landmark decision defining free speech rights on the internet, the Court illustrated how the internet provides for virtually unlimited capacity for communication of all kinds. Indeed, the Court observed:

> *This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. 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. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.*

Reno v ACLU, 521 U.S. at 870. The Court, harkening back to its decision in McIntyre, ultimately concluded that "the vast democratic forum of the internet" would be stifled if users were unable to preserve their anonymity online. Id. at 868. Quoting McIntyre, the Court observed that compelled identification can have a chill on freedom of speech and expression, and that "anonymity is a shield from the tyranny of the majority ...It thus exemplifies the purpose behind the Bill of rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." McIntyre, 514 U.S. at 357.

Similarly, in Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999), the United States District Court for the Northern District of California sought to reach an equilibrium between the plaintiffs right to pursue a legitimate cause of action against concerns for the potential chilling effect of revealing online anonymity. Confronted with this dilemma, the court observed:

> *People are permitted to interact pseudonymously and anonymously with each other so long as those act are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate.... 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 identities.

Id. at 578. Rather than haphazardly reveal the identities of anonymous speakers as a means of silencing unlawful speech , courts have instead relied on the speaker' s audience to discern the content of the message. See McIntyre, 514 U.S. at 348 n.11 (stating "don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing.... They can evaluate its anonymity along with its message, as long as they are permitted...to read that message.") (citations omitted).

While it is abundantly clear nondisclosure of identity is a fundamental principle of a free society, it is also necessarily critical for the preservation of blogs which espouse unpopular or underrepresented views, engage in legitimate exposure of illegal practices, promote consumer safety issues or deal with issues n which government officials or those connected with the feed industry can speak anonymously with consumers without fear of retribution from corporate giants. See Abrams v United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail ...."). "In contemporary society, the individual is often overwhelmed by the size, wealth, and power of impersonal organizations, both in the private and public sectors." Richard S. Miller, Tort Law and Power. A Policy-Oriented Analysis, 28 Suffolk U. L. Rev. 1069, 1076 (1994) (citing Allen M. Linden, Tort Law as Ombudsman, 51 Can. B. Rev. 155 (1973)). Corporate Defendants should not be permitted to abuse the discovery process by discovery aimed at unmasking an anonymous critic as a scare tactic to chill continued criticism. See, e.g., David Boies, The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution, 39 ST. Louis U. L.J. 1207, 1210 (1995)(Lawsuits do not exist to provide discovery for its own sake (or to provide grist for publicity mills), or to punish (fair or unfair) by imposing the expense and disruption of litigation, or even to provide an outlet for dissatisfaction with criticism. Lawsuits are to vindicate a legal right.).

The Internet embodies the democratic institution of the marketplace of ideas in the fullest sense. As the Supreme Court explained in Reno, "from the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." Reno v. ACLU, 521 U.S. 844, 853, 870 (1997). The fascination of the Internet lies in its potential for realizing the concept of public discourse at the heart of the Supreme Court's First Amendment jurisprudence." See Daniel A. Farber, Free Speech Without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554, 580-82 (1991) (arguing that freedom of speech is essential to promoting the wide dissemination of public discourse). A prevalent metaphor and the central tenet for the First Amendment public discourse is the "marketplace of ideas." See Hustler Magazine, Inc. v Falwell, 485 U.S. 46, 56 (1988) (stating that "'a central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas.) (quoting FCC v Pacifica Found, 438 U.S. 725, 745-46 (1978)). The "marketplace of ideas" metaphor originated in Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The "marketplace of ideas" concept has remained prevalent theme of First Amendment jurisprudence ever since. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390

(1969) (articulating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas ...."). "The marketplace of ideas is a sphere of discourse in which citizens can come together free from governmental interference or intervention to discuss a diverse array of ideas and opinions." See Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805, 1086 (1995) (arguing that "the perfect `marketplace of ideas' is one where all ideas, not just the popular or well-funded ones, are accessible to all."). "To the extent that this ideal isn't achieved, the promise of the First Amendment is only imperfectly realized." Id. Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 855, 893-94 (2000). "Scholars have touted the Internet as the living embodiment of the 'marketplace of ideas' metaphor that lies at the heart of First Amendment theory." Id. at 893.

C. Defendants' Response in Support of Their Motion to Compel

Defendants are entitled to discovery of any non-privileged matter relevant to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). To be discoverable, relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Id. There is no doubt the communications at issue here are highly relevant, both to the merits of the case as well as to issues pertinent to class certification. The writings demonstrate Plaintiffs' individual and varied levels of awareness of the quality and safety of the pet food at issue, illustrate their reactions to and interpretations of specific advertisements, and discuss in great detail their pets' health and potential causes of their pets' alleged illnesses here at issue. In short, the writings go to the heart of what this case is about.

Rule 34, which, like other discovery rules, is to be construed broadly and liberally, see Burns v. Thiokol Chemical Corp., 483 F.2d 300, 304 (5th Cir. 1973), expressly permits the discovery of "writings." Fed. R. Civ. P. 34 (a)(1)(A). Courts routinely grant motions to compel the production of relevant writings by party-opponents, even writings of an ostensibly personal nature. See, e.g., Hoglund v. Limbach Constructors, Inc., No. 95-2847, 1998 WL 307457, at *6 (S.D. Fla. Mar. 30, 1998) (ordering production of diary in response to request calling for "[a]ny and all personal memoranda, diaries, journals, or other documents prepared by Plaintiff which relate in any manner to Plaintiff's employment with Defendant or separation

from that employment"); Cherenfant v. Nationwide Credit, Inc., No. 03-60655-CIV, 2004 WL 5315889, at *2 n.3 (S.D. Fla. May 12, 2004) (stating notes "in the form of a diary/calendar" are responsive to request seeking "[a]ll personal diaries or calendars. . . ." (first alteration in original) (quotation marks omitted)); Topol v. Trs. of Univ. of Pa., 160 F.R.D. 476, 477 (E.D. Pa. 1995) (granting motion to compel plaintiff's personal diary because "diary is clearly relevant to the present litigation"); Carolan v. N.Y. Tel. Co., No. 83 Civ. 8308(JMC), 1984 WL 368, at *5 (S.D.N.Y. May 17, 1984) ("[D]efendants are entitled to such portions of the [plaintiff's] diary as pertain to plaintiff's claims."). Nonetheless, Plaintiffs refuse to comply with this most basic discovery request. While their objections here center around the First Amendment right to speak anonymously, Plaintiffs have refused to produce *any* of their pet food-related communications.

Plaintiffs claim that compelling disclosure of their writings would violate their First Amendment rights to speak anonymously. Although the First Amendment does protect the right to anonymous speech, see McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), the First Amendment privilege is not absolute. See e.g., Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 562 (S.D.N.Y. 2004) ("Anonymous speech, like speech from identifiable sources, does not have absolute protection."). By alleging that they were deceived by certain representations and that Defendants' products harmed their pets, Plaintiffs put squarely at issue their knowledge and general awareness of pet food content, quality and advertising, as well as facts related to the health of their pets. Having initiated and maintained this lawsuit, Plaintiffs may not invoke a constitutional privilege to avoid their obligations to produce relevant discovery. See Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1087 (5th Cir. 1979) ("[I]t would be unfair to permit [plaintiff] to proceed with his lawsuit and, at the same time, deprive [defendant] of information needed to prepare its . . . defense.").

Numerous courts have rejected attempts to withhold discovery in a civil action on First Amendment grounds. In Anderson v. Nixon, the plaintiff, a well-known journalist, sued a group of individuals alleging a conspiracy to harass him on the basis of his writings. 444 F. Supp. 1195, 1197 (D.D.C. 1978). During a pretrial deposition, the plaintiff refused to disclose the names of certain journalistic sources, asserting the reporter's privilege grounded in the First Amendment. Defendants filed a motion to compel plaintiff to reveal the names, arguing that they had a right to develop facts that would enable them to establish their defenses, that plaintiff waived his privilege to withhold sources by bringing the action, and that "the necessities of the case as a matter of law justify breaching plaintiff's qualified privilege." Id. at 1198.

Despite acknowledging that "[t]he newsman's privilege is a fundamental personal right well founded in the First Amendment," id. (quoting Lovell v. Griffin, 303 U.S. 444, 450 (1938)), the court granted the defendants' motion to compel. The court reasoned:

> Plaintiff's pledge of confidentiality would have remained unchallenged had he not [brought suit]. Plaintiff is attempting to use the First Amendment simultaneously as a sword and a shield. He believes he was wronged . . . . But when those he accuses seek to defend by attempting to discover who his sources were . . . Plaintiff says this is off limits a forbidden area of inquiry. *He cannot have it both ways. Plaintiff is not a bystander in the process but a principal. He cannot ask for justice and deny it to those he accuses.*

Id. at 1199 (emphasis added). The court further concluded that the information sought by the defendants was "highly relevant data . . . that must be tested through the accepted adversary process [or] defendants lose critically significant rights." Id. According to the court, "[h]aving chosen to become a litigant, the newsman is not exempt from those obligations imposed by the rule of law on all litigants in the federal courts. As a litigant he has a duty to conform to the rules of procedure. The public interest in fair and impartial administration of justice demand nothing less." Id. The court additionally noted that allowing the plaintiff to withhold such

information created the potential for "a vast and unfair litigation advantage to the newsman-plaintiff, who could preserve inviolate information obviously relevant to an adequate defense of the lawsuit he has precipitated." Id.

A similar result was reached in Driscoll v. Morris, 111 F.R.D. 459, 461-63 (D. Conn. 1986). There, the plaintiff, a reporter, sued defendant for defamation and intentional infliction of emotional distress. Id. at 460. Defendant moved to compel plaintiff to reveal his confidential sources. Plaintiff objected, invoking a First Amendment privilege. After acknowledging that the Second Circuit recognizes such a privilege, the court nevertheless granted defendant's motion to compel. Id. As an initial matter, the Driscoll court recognized that the question whether a First Amendment privilege exists is only the beginning of the inquiry. The more important question is whether a plaintiff waived such a right by "invok[ing] the court's power for personal relief, thereby putting the identity of his sources at issue." Id. Significantly, the court distinguished those cases that recognized and upheld a First Amendment privilege on the ground that "[i]n the instant case the reporter asserting the privilege against disclosure of confidential sources *is not merely a non-party witness or a defendant in a libel suit but is the party who initiated the lawsuit*." Id. (emphasis added). The court considered the fact that the information sought by the defendant was "not merely relevant, but goes to the heart of the defense," and that "plaintiff [had] placed at issue the identity of his sources." Id. at 463. Following Anderson, the court found that "the plaintiff, by asserting a privilege against disclosure, is attempting to use the shield of privilege as a sword to undermine the defendant's preparation of her defense." Id. at 463. The court concluded it would be "uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid

defense or materially aid the defense." Id. (internal quotations omitted). Plaintiff was therefore held to have waived the privilege against disclosure. Id.; see also Campus Commc'ns, Inc. v. Freedman, 374 So. 2d 1169 (Fla. Dist. Ct. App. 1979) (per curiam) (following Anderson and rejecting plaintiff's First Amendment claim that confidential sources need not be disclosed in discovery);

Constitutional rights often yield to discovery obligations in civil suits. In Wehling, for example, plaintiffs filed a libel action alleging they had been defamed by a story on the CBS Evening News. 608 F.2d at 1086. CBS sought pretrial discovery concerning the details of the allegedly illegal enterprise that was the subject of the story. One of the plaintiffs refused, invoking his Fifth Amendment privilege against self-incrimination. Id. The district court dismissed the action with prejudice. On appeal, the Fifth Circuit applied a balancing test to determine whether the plaintiff's Fifth Amendment right not to incriminate himself should give way to the defendant's interest in obtaining relevant discovery. After acknowledging that "a civil plaintiff has no absolute right to both his silence and his lawsuit," 608 F.2d at 1088, the court stayed the action entirely until plaintiff was no longer under the threat of criminal prosecution and thus could disclose relevant information freely. Notably, the court did not hold that plaintiff had a right simply to continue to pursue his cause of action while withholding relevant discovery.

The cases cited by Plaintiffs in their objection do not justify their refusal to produce the documents requested. Although these cases address the application of the First Amendment in various contexts – *e.g.*, political campaigns, criminalization of child pornography, and a municipal ordinance restricting the distribution of handbills, see McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995); Reno v. American Civil Liberties Union, 521 U.S.

844 (1997); Talley v. California, 362 U.S. 60 (1960) – they do not begin to address, much less limit, a litigant's obligation to provide discovery. They certainly do not suggest that a litigant may file an action yet shield from defendants in that action discovery relevant to the case.

By asserting claims that require proof of reliance and causation, Plaintiffs have put their own states of mind and behaviors squarely at issue, which they describe in numerous internet postings. See Ex. 5. The law is clear that they may not use the First Amendment to shield their own statements concerning those issues from discovery. Plaintiffs' writings also demonstrate biases that could impact their own credibility in addition to their adequacy to serve as representatives of a putative class of consumers. See, e.g., Kipperman v. Onex Corp., No. 1:05-CV-1242-JOF, 2008 WL 1902227, at *10 (N.D. Ga. Apr. 25, 2008) ("Defendants seek settlement discovery for at least one arguable admissible purpose, bias . . . ."); Wheeles v. Human Res. Sys., Inc., 179 F.R.D. 635, 640 n.6 (S.D. Ala. 1998) ("The court rules this matter discoverable under Fed. R. Civ. P. 26(b)(1), as potentially going to the bias of the witnesses . . . ."). Finally, to the extent the postings demonstrate, as they do, the tremendous variation among individual Plaintiffs in terms of awareness of pet food issues or behaviors regarding the care of their pets, they are also critical to Defendants' opposition to Plaintiffs' motion for class certification. In short, the law forbids Plaintiffs from using the Constitution to prevent Defendants from obtaining highly relevant discovery.

Additionally, Plaintiffs' refusal to produce their non-anonymous writings is inexplicable. Plaintiffs fail to articulate *any* justification for withholding such communication; they simply refuse to produce them. Susan Peters, for example, who maintains a website entitled "Ask Susan Peters" that provides regular commentary on the health and safety of specific pet food products, boldly states in her response to Request No. 20 that she has no responsive

documents, "excluding anonymous *or other internet website posts.*" Pl. Susan Peters's Resps. to Defs.' Joint First Reqs. for Producs., Resp. No. 20, at 29 (emphasis added). There is simply no basis to withhold non-anonymous website posts from a request that seeks "[a]ll documents pertaining to communication . . . regarding pet food." Defs.' Joint First Set of Reqs. for the Produc. of Docs. to Pl. Susan Peters, Req. No. 20, at 6. Moreover, the scope of the request for "all documents" encompasses more than simply what was posted on the internet; it includes, among other things, letters, newsletters, e-mails sent and received, memoranda, diaries, journals, and logs maintained regarding pet food. Plaintiffs' lack of response regarding these non-anonymous writings is at odds with Local Rule 26.1.G.3, which requires that an objection made under Fed. R. Civ. P. 34 "state with specificity all grounds" or "shall be waived." S.D. Fla. L.R. 26.1.G.3.

II. Plaintiffs Should Respond to Mars Interrogatories Nos. 5 and 6 to Provide the Identifiers Used in Their Online Communications Regarding Pet Food.

A. Mars Interrogatory Nos. 5 and 6

The Mars Defendants served the following interrogatories on each Plaintiff:

5. Please identify yourself, including your full name and any prior names used, all electronic identities used at any time during the past five (5) years (including email addresses, user names, or screen names), all addresses at which you have lived for the past ten (10) years, your date of birth, and your driver's license number and state of issuance.

6. Please identify each website or electronic community (including weblogs, internet bulletin boards, and listservs) which you have maintained or to which you have contributed during the past five (5) years and for each, state the registered name you used, the nature of the website or electronic community, the internet address (URL), and the date or period of time during which you maintained or contributed to it.

B. Plaintiffs' Objections

In response to these interrogatories, Plaintiffs asserted the same multi-page First Amendment objection articulated above. Plaintiffs also claimed that disclosure of their online identities would violate their rights to privacy. Their privacy objection is as follows:

*To the extent that this interrogatory seeks all electronic identities used at any time during the past five (5) years (including all email addresses, user names, or screen names), this is an invasion of the Plaintiffs' right to privacy to keep sensitive information personal and confidential. For example, the request is so broad that it would encompass "electronic identities," user names" or "screen names" used for online banking, credit cards, utilities, etc., which has no relevance whatsoever in this case. Courts have held that, insofar as discovery requests seek confidential information such as driver's licenses and social security numbers, privacy concerns are relevant, and the party requesting such information "must show that the value of the information sought would outweigh the privacy interests of the affected individuals." Case v Platte County, 2004 U.S. Dist. LEXIS 18052, 2004 WL 1944777, at *2 (D. Neb. June 11, 2004)(citing Onwuka v. Fed. Express Corp., 178 F.R.D. at 517). See Walters v. Breaux, 200 F.R.D. 271,274 (W.D. La. 2001)(citing cases protecting legitimate privacy concerns with respect to social-security numbers). Even when social-security information is needed to help locate individuals, courts will decline to compel production of social-security numbers when other identifying and locating information is available. See McDougal-Wilson v. Goodyear Tire and Rubber Co., 232 F.R.D. 246, 252 (E.D.N.C. 2005); Raddatz v. Standard Register Co., 177 F.R.D. 446, 448 (D. Minn. 1997)(stating that court should not order the production of personnel files in their entirety where less intrusive means may be used to obtain the relevant information). Delgado v. Ortho-McNeil, Inc., 2007 U.S. Dist. LEXIS 74731, *10 (C.D. Cal. 2007) (citing privacy concerns, the defendant objected to plaintiffs request for the names, addresses, phone numbers, email addresses, and social security numbers. The Court agreed that the "production of telephone numbers, email addresses , and social security numbers is inappropriate"). McGee v. City of Chicago, 2005 U.S. Dist. LEXIS 30925, 7-8 (N.D. Ill. 2005) (good cause exists to prohibit public disclosure of private information , including a drivers license number, because such disclosure may "cause the Individual Defendants unnecessary annoyance or embarrassment and would unfairly and gratuitously invade their privacy"); Chavez v Daimler Chrysler Corp., 206 F.R.D. 615, 622 (S.D. Ind. 2002) ("To the extent that Chavez seeks the names and phone numbers of current supervisory-level employees, such information may be redacted because these contacts are to be made through Defendant's counsel only"); Vogt v Tex Instruments, Inc., 2006 U.S. Dist. LEXIS 67226, 11-12 (N.D. Tex. 2006) (citing privacy concerns, defendant objected to providing plaintiff with names, last known addresses , phone numbers, and social security numbers of employees at defendant's facility. In response, the court stated: "The Court agrees with Defendant's concerns regarding the privacy of its employees. At this stage, Plaintiffs have not demonstrated a need for locating information beyond names and addresses .. .If any notices are returned to Plaintiffs' counsel because the contact information is inaccurate, Plaintiffs may petition the District Court to order Defendant to produce the phone numbers and/or Social Security numbers of those potential opt-in plaintiffs"); In re B & H Towing, Inc., 2006 U.S. Dist. LEXIS 42758, 14-15 (S.D. W.Va. 2006) (in response to an interrogatory seeking the disclosure of knowledge of company employees , the court required a redaction of social security numbers, phone numbers , addresses, and other*

*private information). Pendlebury v. Starbucks Coffee Co., 2005 U.S. Dist. LEXIS 36748, *9-10 (S.D. Fla. 2005) (defendant asked plaintiff to identify "all names, identifiers, internet handles,' electronic mail addresses, or other descriptors used by plaintiffs when sending electronic mail or posting any content, message, or other communication on any chat board, internet web log, internet web site, chat room, text message, or other internet media or electronic communication that relates or refers to Starbucks or their employment with Starbucks." The court held that "this Interrogatory sweeps too broadly and again infringes on Plaintiffs' privacy rights. Rather than seeking Plaintiffs ' (private) e-mail addresses and "internet handles," the Court concludes that Defendant should first establish a foundation for the request by inquiring (through an interrogatory or at a deposition) whether Plaintiffs have, in fact, posted messages concerning store manager duties or hours worked. Only if this question is answered in the affirmative should Plaintiffs then be required to divulge this private information").*

C. Defendants' Response in Support of Their Motion to Compel

Plaintiffs' privacy concerns arise from an overly broad construction of Defendants' interrogatories. Plaintiffs focus on the possibility that Defendants' request encompasses "'electronic identities,' 'user names' or 'screen names' for online banking, credit cards, utilities, etc. which has no relevance whatsoever in this case." Id. As counsel for Defendants have made clear, however, see Ex. 7 (Letter from Philip A. Sechler, Esq. to Patrick N. Keegan, Esq. & Catherine J. MacIvor, Esq., at 7 (July 8, 2008)), Defendants do not seek such irrelevant information. For purposes of this request, Defendants are interested solely in electronic identities used in connection with communications regarding pet food. Thus limited, these interrogatories do not implicate Plaintiffs' privacy concerns, and Plaintiffs have not articulated any discernible privacy interest in what Defendants' requests seek: the internet handles they use to *publicly* discuss pet food and identification of the websites where they engaged in such discussions.

Moreover, any privacy rights Plaintiffs have in their particular electronic identities are substantially outweighed by Defendants' rights to relevant discovery. As the Supreme Court has recognized, the federal discovery rules "do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the

Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30 (1984).

This Court has repeatedly ordered disclosure of personal information far more sensitive than the screen name one has used to discuss pet food online. In Socas v. Northwestern Mutual Life Insurance. Co., for example, the plaintiff resisted defendants' discovery request for her financial records, arguing that defendants could not show a "necessity for the requested discovery that surpasses Plaintiff's privacy interest in her personal financial information." No. 07-20336-CIV, 2008 WL 276069, at *2 (S.D. Fla. Jan. 31, 2008). The Court held that such a showing was unnecessary where the party seeking to withhold discovery was a litigant in the action. The Court held, "unlike the cases cited by Plaintiff, this case involves financial records that *only implicate the privacy interests of a party litigant and are directly relevant to the subject matter of the litigation*. In such a scenario, Florida law does not require this Court to apply the stark 'necessity' test that Plaintiff proposes." Id. (emphasis added). Similarly, in Platypus Wear, Inc. v. Clarke Modet & Co., the Court ordered the disclosure of plaintiff's tax returns simply on the basis of a showing of relevancy, despite recognizing "the inherently private nature of tax returns." No. 06-20976-CIV, 2008 WL 728540, at *3 (S.D. Fla. Mar. 17, 2008).

Indeed, even the case cited by Plaintiffs supports disclosure here. In Pendlebury v. Starbucks Coffee Co., No. 04-80521-CIV-MARRA/SELTZER, 2005 U.S. Dist. LEXIS 36748 (S.D. Fla. Aug. 29, 2005), this Court expressly indicated that, with proper foundation, plaintiffs would be compelled to produce such information. The defendant in Pendlebury had seen internet postings related to the case and sought to determine through discovery whether plaintiffs

had authored the postings. The defendant therefore requested all electronic identifiers used by plaintiffs when posting online content related to the allegations. The Court denied the defendant's motion to compel, stating:

> Rather than seeking Plaintiffs' (private) e-mail addresses and "internet handles," the Court concludes that Defendant should first establish a foundation for the request by inquiring (through an interrogatory or at a deposition) whether Plaintiffs have, in fact, posted messages concerning store manager duties or hours worked. *Only if this question is answered in the affirmative should Plaintiffs then be required to divulge this private information.*

Id. at *10. (emphasis added). Unlike the defendants in Pendlebury, Defendants here are only seeking such information *to the extent they were in fact used for online communications regarding pet food.* Moreover, unlike the defendants in Pendlebury, Defendants have ample proof that Plaintiffs have posted materials online concerning the allegations in this case. For example, "JanC," who has posted 602 times to date on pet-related online forums, writes, "cmacivor: I am part of this lawsuit . . . . Not only do pet parents everywhere . . . thank you but so do our beloved fur babies. It's about time somebody took these [pet food] companies to task for all the BS (excuse me but that's what it is) we've been fed over the years so that we all felt perfectly comfortable feeding our babies this poison they label as pet food." Posting of "JanC" to Itchmo Forums for Cats & Dogs, http://itchmoforums.com/law-and-politics-about-pets/florida-pet-food-lawsuit-t4404.15.html (Apr. 13, 2008, 07:49:32 AM). See also Posting of "lesliek" to Itchmo Forums for Cats & Dogs, http://itchmoforums.com/law-and-politics-about-pets/florida-pet-food-lawsuit-t4404.15.html (Apr. 13, 2008, 06:07:47) (identifying as Plaintiff and stating in online forum entitled "Florida Pet Food Lawsuit": "I think there is a need for attention brought to the [pet food companies'] way of doing business. The lies about ingredients, false advertising, silent recalls & toxins . . . ."). "JanC" and "leslieK" are only two of numerous

Plaintiffs who have identified themselves online as Plaintiffs while posting extensively about matters raised in this case. Defendants thus have a firm basis to conclude that "Plaintiffs have, in fact, posted messages concerning" the allegations. Pendlebury, 2005 U.S. Dist. LEXIS 36748, at *10. There is simply no right to privacy that outweighs Defendants' right to discover such information.

CONCLUSION

For these reasons, the Court should compel Plaintiffs to produce documents in response to Document Request Nos. 20, 22 and 23 and to answer Mars Interrogatory Nos. 5 and 6 to identify electronic identities used for online communication regarding pet food and each online community which any Plaintiff has maintained or to which any Plaintiff has contributed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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