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United States District Court,
W.D. Louisiana.
In re Richard L. BAXTER
No. 01-00026-M.

Dec. 20, 2001.

Victor L. Crowell, Forrester Jordan & Dick, Shelly D. Dick, Baton Rouge, LA, for Plaintiff.

MEMORANDUM RULING

KIRK, Magistrate J.

***1** Before the court is plaintiff's application for order to conduct discovery [Doc. # 1] and a motion to intervene anonymously by J. Doe and motion to stay this court's order of October 18, 2001 [Doc. # 8]. Also appended to the motion to intervene is a "Complaint for Relief pursuant to the First Amendment to the United States Constitution and for Injunctive Relief," not separately docketed. These matters are referred to the undersigned for decision.

This application was filed by Richard L. Baxter ("Baxter") on August 13, 2001 as a miscellaneous case on the docket of this court and seeks only an order to perpetuate testimony pursuant to Fed.R.Civ.P. 27. The application alleges that Baxter is a Louisiana resident who seeks an order compelling Homestead Technologies, Inc. ("Homestead"), a foreign corporation located in the State of California, to provide the names and identities of authors, editors and publishers of false and defamatory materials alleged to have been published on a website hosted by Homestead, *Truth@ULM.com.*[FN1] The application asserts that those persons' names remain unknown and may be domiciled in Louisiana.

FN1. Various terms have been used to describe vicious attacks and unfounded rumors on the internet, including "flaming" and cybersmear.

Baxter's application alleges that he expects to be a plaintiff in a suit in this court, but is unable to bring the action because he does not know the identities of the persons who authored, edited and published the materials on the website, nor the details of the extent of the involvement, if any, of Homestead. The proposed defendants are Homestead and the unknown authors, publishers and contributors to the website. Jurisdiction is asserted by Baxter on the basis of federal question, being specifically the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230. et seq., who alleges that Congress has preempted the field concerning decency in Internet communications. Baxter alleges that his legal rights and remedies are dependent upon the construction and interpretation of that Act, but also he asserts diversity jurisdiction. Baxter's application recites in detail the basis for his proposed defamation suit and seeks to take the depositions of corporate representatives and employees of Homestead.

A hearing was scheduled on plaintiff's application [Doc. # 2]. Before the hearing could be held, however, Baxter, through counsel, negotiated an arrangement with counsel for Homestead, pursuant to which Homestead was to provide the requested discovery upon receipt of a court order ordering it. Because the motion was unopposed by Homestead and because there were no other parties to this lawsuit, the court entered an order directing Homestead to respond to the interrogatories and request for production of documents attached to the plaintiff's motion [Doc. # 6] and the hearing was canceled.

Immediately thereafter, the motion to intervene now before the court was filed by J. Doe [Doc. # 8]. The motion to intervene, the memorandum in support and the complaint filed by J. Doe admit that J. Doe is the author of some of the materials which

are the subject of this dispute and that J. Doe "may be an interested party" in subsequent proceedings. Doe seeks permission to intervene in this case in order to object to the court's jurisdiction, to object to Baxter's ability to proceed pursuant to Fed.R.Civ.P. 27 (perpetuation of testimony) and to raise issues of free speech.[FN2] Pending decision on the motion, the undersigned stayed the order [Doc. # 12].

> FN2. Doe also suggests that the Eleventh Amendment may be implicated if Baxter is acting on behalf of a state agency, namely the Board of Supervisors of the University of Louisiana system. However, Baxter is not proceeding on behalf of a state agency and there is no evidence before the court that he is, in fact, representing a state agency.

***2** Baxter argues that Doe has no right to intervene in this proceeding and, until allowed to intervene, has no standing to question the court's jurisdiction or Baxter's right to proceed under Fed.R.Civ.P. 27.

JURISDICTION

Baxter asserts federal question jurisdiction pursuant to the CDA and vaguely asserts diversity jurisdiction. Although it is no doubt true that, as Baxter asserts, Doe has no right to challenge the court's jurisdiction before being allowed to proceed as a party in the case, this court always has a duty to examine its own jurisdiction. *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir.2000).

As Baxter points out in brief, the Fifth Circuit has held that there need not be an independent basis for federal jurisdiction in a proceeding such as this to perpetuate testimony so long as the contemplated action would be cognizable in federal court. *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (5th Cir.1979), *cert. den.*, 444 U.S. 1044, 100 S.Ct. 731, 62 L.Ed.2d 730. Fed.R.Civ.P. 27 requires a petitioner to show that the petitioner expects to be a party in an action "cognizable in a court of the United States." Under the allegations of the application, federal jurisdiction would exist in such an action and, thus, the action would be cognizable in the federal courts. Therefore, this court must determine whether either federal question or diversity jurisdiction would exist.

Federal Question Jurisdiction

Baxter asserts jurisdiction pursuant to the CDA, 47 U.S.C. § 230, and argues that the federal Government preempted the field covering decency in communications. He also suggests that his legal rights and remedies are dependent upon the construction and interpretation of that Act, thereby vesting jurisdiction in this court.

However, the mere presence of a federal issue does not automatically confer federal question jurisdiction. Rather, for a claim to arise under the Constitution, laws or treaties of the United States, the right or immunity created by the Constitution or laws must be an essential element of plaintiff's claim. *See In re Orthopedic Bone Screw Products Liability Litigation*, 939 F.Supp. 398 (E.D.Pa.1996); *Transtexas Gas Corp. v. Stanley*, 881 F.Supp. 268 (S.D.Tex.1994). The CDA and the First Amendment do not form essential parts of plaintiff's cause of action, but only potential defenses to plaintiff's action. In the CDA, the federal Government did not completely preempt the field and plaintiff's claim still lies under the defamation laws of Louisiana. *See Ceres Terminals, Inc. v. Industrial Com'n of Illinois*, 53 F.3d 183 (7th Cir.1995).[FN3]

> FN3. "Complete preemption," of the kind which will permit a federal court to exercise subject matter jurisdiction over a complaint which, on its face, alleges only state claims, differs from ordinary preemption. While "the inquiry for ordinary preemption is substantive in nature and focuses on whether a legal defense exists," the inquiry for complete preemption "is jurisdictional

> in nature and focuses on whether Congress intended to make the plaintiff's cause of action federal and removable despite the fact that plaintiff's complaint only pleads state claims." *Giddens v. Hometown Financial Services,* 938 F.Supp. 801 (M.D.Ala.1996). *See also Doleac v. Michalson,* 264 F.3d 470 (5th Cir.2001); *Soley v. First Nat. Bank of Commerce,* 923 F.2d 406 (5th Cir.1991).

Although Section 230 preserves a plaintiff's rights to proceed against the authors of defamatory material on the Internet, *Zeran v. America Online, Inc.,* 129 F.3d 327 at 330 (4th Cir.1997), *cert. den.,* 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998), it does not create an independent cause of action against them. Similarly, though the Act only protects the provider or user of an interactive computer service against suits regarding the content of information provided by another "information content provider," the Act does not affirmatively provide for a cause of action against the provider or user. 47 U.S.C. 230(c)(1).

***3** Therefore, even as to plaintiff's potential claim against Homestead that it is an information content provider, the CDA does not confer federal question jurisdiction.

Diversity Jurisdiction

Plaintiff also asserts jurisdiction on the basis of diversity, 28 U.S.C. § 1332. Clearly, the only potential defendant whose identity is known is Homestead, which is alleged to be a California company. Therefore, if the jurisdictional amount is satisfied, diversity jurisdiction would attach to that claim. Baxter may or may not sue others whose presence would destroy diversity. While Doe correctly points out that plaintiff has not asserted any amount in dispute in his application, much less an amount to satisfy the jurisdictional amount, the nature of plaintiff's claim and the detailed account of his claim satisfies the court that the jurisdictional amount could, through proper pleading, be met. *See Luckett v. Delta Airlines, Inc.,* 171 F.3d 295 (5th Cir.1999). Were this court not satisfied that the amount was met, it could simply require supplementation with regard to the amount in dispute by affidavit or otherwise. *Id.*

If the suit now before the court was one by Baxter against Homestead alleging diversity jurisdiction, Baxter would be expected to assert more specifically the facts supporting diversity jurisdiction. But this is a suit to perpetuate testimony and all that is required is that this court be convinced that the complainant could, at the proper time, support federal jurisdiction. I believe it would be wholly improper to require applicant to support federal jurisdiction of a proposed suit against parties which include some whose identities are not yet known at this stage of the proceedings and where all that is before the court is a motion to perpetuate testimony. Baxter has made an adequate showing of jurisdiction for purposes of the matter now pending before the court.[FN4]

> FN4. This court can reconsider jurisdiction or the parties may raise the issue again once a damage suit is actually filed, the identity of all parties is known and all facts concerning the jurisdiction or not of this court are known. This court's determination now as to the existence of jurisdiction is simply for the purpose of plaintiff's application under Fed.R.Civ.P. 27. *See Dresser Industries, Inc. v. U.S.,* 596 F.2d 1231 (5th Cir.1979).

Although not a jurisdictional issue, the proposed intervenor Doe also complains that plaintiff Baxter may not proceed under Fed.R.Civ .P. 27 to perpetuate testimony by utilizing interrogatories or requests for production. However, such procedure is expressly provided for by our rules. Fed.R.Civ.P. 27(a)(3) authorizes this court to specify whether the deposition shall be by oral examination or by written interrogatories. Rule 30(b)(5) provides that the notice to a deponent may be accompanied by a re-

quest for production of documents pursuant to Rule 34. Rule 27(c) provides that the rule does not limit the power of a court to entertain an action to perpetuate testimony and the court's regulation of discovery is always subject to its reasonable discretion.

MAY DOE INTERVENE?

Fed.R.Civ.P. art. 24 provides for intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties." Permissive intervention is appropriate where an applicant's claim or defense and the main action have a question of law or fact in common.

***4** In this case, I find that the person proceeding as J. Doe has an interest relating to the subject matter of this suit and the disposition of the suit, i.e., the possible order to disclose Doe's real name and, if not allowed to intervene, would not have an effective way to prevent such an order and to protect his interests. Certainly, Homestead is not a party whose presence would protect Doe's interests.

The real question, though, is whether Doe should be allowed to proceed anonymously by intervention. The answer to this question, of course, implicates the laws of defamation and the judicially interpreted constitutional right of freedom of speech as well as evolving policy issues generated by the creation and acceptance of the internet.

Much has already been written, both in case law and journals as well as the popular press, concerning the need to strike the balance between these sometimes competing interests. For example, in one noted case, *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C.1998), the court observed that:

> "The near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to computers and thus to the Internet have created ever-increasing opportunities for the exchange of information and ideas in 'cyberspace.' This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene and pornographic materials, and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape."

"The internet (or 'Net'), heralded as the most significant achievement in human speech since the printing press, has become ground zero in a legal battle over the First Amendment and the right of individuals to speak (or rather type) anonymously. At its best, the Net is the ultimate conduit for free speech and expression; at its worst, the Net can be a character assassin's greatest weapon." Matthew S. Effland, *Free Speech Versus Freedom from Responsibility on the Internet*, 75-NOV Fla.B.J. 63 (2001).

Professor Lidsky of the University of Florida writes:

> "Speech from a 'multitude of tongues' may lead to truth, but it may also lead to the Tower of Babel. And the level of discourse on [certain internet sites] also suggests that fostering unmediated participation may make public discourse not only less rational and less civil; it also runs the risk of making public discourse meaningless. A discourse that has no necessary anchor in truth has no value to anyone but the speaker, and the participatory nature of internet discourse threatens to engulf its value as discourse.
>
> The problem, therefore, is to strike a balance between free speech and the preservation of civility. If the goal of making public discourse more

participatory and ultimately more democratic is to be realized, the speech of ordinary John Does merits a very wide expanse of 'breathing space,' wider than it currently receives. First Amendment doctrine therefore cannot hold ordinary John Does to the standards of professional journalists with regard to factual accuracy, because part of what gives the Internet such widespread appeal is the fact that it allows ordinary citizens to have informal conversations about issues of public concern. Although any approach to the problems posed by the new Internet libel actions must respond to the unique culture of the message boards, the law cannot allow that culture to degenerate into a realm where anything goes, where any embittered and malicious speaker can lash out randomly at innocent targets. Although many of the new libel plaintiffs are powerful corporate Goliaths suing to punish and deter their critics, some are not. Some are simply responding in the only way available to prevent aggressively uncivil speech, the sole purpose of which is to cause emotional and financial harm. Hence, any solution to the problems posed by these new suits must be tuned finely enough to distinguish incivility that must be tolerated for the good of public discourse from incivility that destroys public discourse." Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855 (2000).[FN5]

FN5. Professor Lidsky's article in the Duke Law Journal is a thoroughly researched, well-written and insightful review of the policy considerations, legal issues, current writings and case law dealing with the Internet, defamation and First Amendment rights.

***5** The benefit of the internet to matters of public concern is immense, however. As noted by Professor Lidsky, "[f]rom a First Amendment scholar's perspective 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. The dominant First Amendment metaphor for describing public discourse is the 'marketplace of ideas.' The marketplace of ideas is a sphere of discourse in which citizens can come together free from government interference or intervention to discuss a diverse array of ideas and opinions. Ideally, the process of interacting in the marketplace of ideas not only fosters the 'search for truth;' it also enables citizens to transcend their differences in order to forge consensus on issues of public concern, or, as Professor Robert C. Post eloquently puts it 'to speak to one another across the boundaries of divergent cultures.' Public consensus, in turn, is an essential precondition of democratic self-government." (Footnotes omitted.) *Id.*

The district court in South Dakota further observed:

"On the one hand, the ability of individual users to log on the Internet anonymously, undeterred by traditional, social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society. On the other, the ability of members of the public to link an individual's on-line identity to his or her physical self is essential to preventing the internet's exchange of ideas from causing harm in the real world. *See generally* Lawrence Lessig, *Code and Other Laws of Cyberspace*, 14-17, 24-29 (2000)." *PatenWizard, Inc. v. Kinko's, Inc.*, 163 F.Supp.2d 1069 (D.S.D.2001).[FN6]

FN6. These tough issues are further complicated by the fact that not all countries' laws yield the same rule nor are they in all cases consistent. *See* Babcock, Powell, Schacter, Schell & Schulz, *Publishing Without Borders: Internet Jurisdictional Issues, Internet Choice of Law Issue, ISP Immunity, and On-Line Anonymous Speech*, 651 PLI/Pat 9 (2001).

"There's never been a lack of hostile people with a

> motive to attack. Aggression is as old as Cain and Abel. Until recently, very few people had the *means* or the *opportunity.* The geometric growth of the internet has provided attackers with these last two ingredients. One result of the internet's growth has been an upsurge of attacks against people, products and institutions that can be launched anonymously and, therefore, with impunity." Dezenhall, Eric, *Nail 'Em!: Confronting High-Profile Attacks on Celebrities & Businesses,"* 156, Amherst, N.Y. Promethus Books 1999.

Nevertheless, some courts have recognized that anonymity on the internet, to a certain extent, is valuable. *For example,* in *Cyberspace, Communications, Inc. v. Engler,* 55 F.Supp.2d 737 (E.D.Mich.1999), the district judge found, based on testimony presented in that case, that "anonymity of the communicant is both important and valuable to the free exchange of ideas and information on the Internet."

Mindful of these policy considerations, I now embark on further legal analysis of this case.

DEFAMATION, THE FIRST AMENDMENT AND ANONYMITY

Mover Doe argues that he should be allowed to intervene anonymously to avoid any retaliation against Doe by Baxter. He correctly points out that anonymous filings have long been recognized by the courts. Doe also suggests that Baxter is a "public figure" requiring proof by him of actual malice before recovery may be had under the Supreme Court's pronouncement in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

***6** Interestingly, mover, who admits he has made some of the statements on the website at issue, is concerned that if retaliation occurs his "career may be ruined by virtue of never receiving promotion[s] or raises." No such concern is expressed for the career of Mr. Baxter, who has been the subject of the statements by Doe.

Also curious is mover's assertion in brief that the University of Louisiana is a state agency and, therefore, is subject to immunity because the State has not consented to suit in federal court. This suit does not involve the University of Louisiana.[FN7]

> FN7. Even if, as mover alleges, Baxter is fronting for the University of Louisiana system (and there is no evidence whatsoever of that), then by filing suit it has consented to suit in federal court. The University of Louisiana is not a defendant in this suit.

Finally, mover seems to suggest that he seeks to proceed anonymously only in this action, that is, "until such time as Richard L. Baxter feels confident enough to file suit against the authors...."

Baxter opposes Doe's motion to intervene anonymously asserting that there is no First Amendment right to anonymity where defamatory speech is at issue. He also suggests that if, in fact, Baxter is deemed to be a public figure and a showing of actual malice is required, then that is all the more reason that Baxter needs the name of Doe so that he can obtain proof from Doe of malice. Finally, Baxter suggests that allowing Doe to remain anonymous is, in effect, a grant of absolute immunity to Doe for defamatory speech.

1. Defamation and Free Speech

A long line of Supreme Court precedent has dealt extensively with the balance between society's interest in redressing defamation and a speaker's free speech rights. This case presents the challenge of arriving at that balance in the context of speech published on the Internet.

The laws of defamation are set forth by state law.[FN8] The First and Fourteenth Amendments to the U.S. Constitution[FN9] limit the authority of state

courts to impose liability for damages based on defamation. Before *New York Times*, defamatory statements were not within the area of constitutionally protected speech.

FN8. La. C.C. art. 2315.

FN9. Under the First and Fourteenth Amendments, neither the federal nor a state government may make any law "abridging the freedom of speech, or of the press...."

New York Times and later *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) "effected major changes in the standards applicable to civil libel actions. Under these cases, public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability." *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). In other words, a plaintiff, in such circumstances, must prove actual malice. *New York Times*, 376 U.S. 254, 84 S.Ct. 710 at 726, 11 L.Ed.2d 686.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), *cert. den.*, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983), the Supreme Court further defined "public figure" for the purposes of the First and Fourteenth Amendments:

> For the most part, those who attain this status have assumed roles of especial prominence in the affairs of the society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

***7** *Gertz* also requires that non-public figures must demonstrate some fault on the defendant's part in order to recover for defamation. The *Gertz* court held that "although a showing of simple fault suffices to allow recovery for actual damages, even a private figure plaintiff is required to show actual malice in order to recover presumed FN10 or punitive damages." *See* summary by Justice O'Connor in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), *cert. den.*, 475 U.S. 1134, 106 S.Ct. 1784, 90 L.Ed.2d 330.

FN10. Presumed damages are damages allowed under a state law which provides for a presumption of malice in certain circumstances, e.g., when criminal conduct is alleged.

After *Gertz*, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), the Supreme Court recognized that all speech is not of equal First Amendment importance and that it is speech on "matters of public concern" that is "at the heart of the First Amendment's protection." *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The *Dun & Bradstreet* court offered several examples of speech which has historically been accorded no protection at all, including obscene speech, fighting words, speech advocating the violent overthrow of the government, speech concerning certain securities transactions and certain kinds of commercial speech. *See also R.A.V. v. City of St. Paul Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), recognizing defamation as an historically regulated category. Therefore, in *Dun & Bradstreet*, the court held that in a case involving a private figure plaintiff and speech of purely private concern, that is, involving no matters of public concern, a showing of actual malice was unnecessary even to recover presumed or punitive damages.

Finally, *Hepps* also required that where a newspaper publishes speech of public concern a private figure plaintiff cannot recover damages without also showing that the statements are false.

In *Hepps*, Justice O'Connor explained that two is-

sues affect the law of defamation so that it may conform to the First Amendment. The first is whether the plaintiff is a public official or public figure and not a private figure. The second is whether the speech at issue is of public concern.

Where, under this analysis, one is found to have published defamatory falsehoods with the requisite culpability, liability may attach, "the aim being not only to compensate for injury, but also to deter publication of unprotected material threatening injury to individual reputation." *Herbert v. Lando.* In other words, spreading false information carries no First Amendment protection. *Id.* The circumstance that the statement may be couched as an opinion as opposed to a fact is not a distinction for purposes of the application of the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

2. Anonymity

Mover, however, asserts not only his right of free speech, but also asserts as part of that right the right to remain anonymous.

***8** The right to proceed anonymously in a lawsuit has, on occasion, been recognized by the courts. For example, in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court held that the First Amendment prohibits the Government from compelling disclosures by a minor political party that can show a reasonable probability that the compelled disclosures will subject those identified to threats, harassment or reprisals. Similarly, in *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), the Supreme Court held that requiring disclosure of the membership list of the local branch of the NAACP would interfere with the members' rights to freedom of association. That case, too, relied on the threat of harassment or physical harm as justification for allowing the anonymity. Also, in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), the court held that requiring disclosure of the names of members of the association denied them their right to freedom of association. Once again the court relied on the threat of reprisals in making its ruling.

The Fifth Circuit has also recognized a litigant's right to proceed anonymously in certain circumstances. In *Doe v. Stegall*, 653 F.2d 180 (5th Cir.1981),[FN11] the court allowed a mother and her two children to proceed under fictitious names in a case where they challenged the constitutionality of prayer in school. The Fifth Circuit noted the general principle that parties must disclose their identities to sue in federal court, but weighed against it the "countervailing factors" in the suit, namely threats of violence.

FN11. *See also Jane Doe v. School Board of Ouachita Parish*, 274 F.3d 289, 2001 WL 1490997 (5th Cir.2001)

In *Stegall*, the parties did, however, agree to disclose their identities to the opposing party and to the court. By that method, the court was afforded an opportunity to "scrutinize their standing to sue" and to proceed with any necessary discovery. The court also observed that First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), finding that "historically, both civil and criminal trials have been presumptively open." There is, the court found, a "clear and strong First Amendment interest" in insuring that "(w)hat transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

The dissent by Judge Gee described the procedure of filing anonymously a "startling procedure" and opined that "there is something to be said, I think, for the notion that one who strikes the king should do so unmasked or not at all." Judge Gee found the justification for proceeding anonymously lacking in the case and would have required a stronger showing of the threat of reprisal in order to allow the

drastic relief.

All of the cases discussed above which have allowed parties to proceed anonymously in certain circumstances relied, as justification, on the threat of reprisal in some form.

***9** Then came the Supreme Court's decision in *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). In *McIntyre*, a pamphleteer challenged a fine imposed by the Ohio Elections Commission for distributing anonymous leaflets opposing a proposed school tax. Noting early on in the opinion that there was "no suggestion that the text of her message was false, misleading or libelous," Justice Stevens analyzed the right of a person to remain anonymous. The court found that historically "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind" *quoting Talley v. California*, 362 U.S. 60, 80 S.Ct. 536 at 538, 4 L.Ed.2d 559 (1960). The court found that the decision to remain anonymous may be motivated by fear of economic or official retaliation, by concern about social ostracism or merely by a desire to preserve as much of one's privacy as possible.

In summarizing the history of anonymous writings, the court reminded us that "even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names." FN12 The court found there was a "respected tradition of anonymity in the advocacy of political causes." Justice Stevens concluded that "under our Constitution, anonymous pamphleteering is not a pernicious fraudulent practice, but an honorable tradition of advocacy and of dissent. 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. The right to remain anonymous may be abused when it shields fraudulent conduct, but political speech by its nature will sometimes have unpalatable consequences and, in general, our society accords greater weight to the value of free speech than to the danger of its misuse...."

> FN12. "Indeed, while we now know that the Federalist Papers were the work of James Madison, John J. and Alexander Hamilton, the documents originally were published under the pseudonym 'Publius'." Babcock, Powell, Schacter, Schell & Schulz, *Publishing Without Borders: Internet Jurisdictional Issues, Internet Choice of Law Issue, ISP Immunity, and On-Line Anonymous Speech*, 651 PLI/Pat 9 (2001).

However, Justice Stevens noted more than once that the issue of falsity or libel was not present in the speech at issue and he noted that "the state interest in preventing fraud and libel stands on a different footing" than the decision with regard to truthful pamphleteering. He observed that Ohio's prohibition encompassed "documents that are not even arguably false or misleading" and that the State's enforcement interest might justify a more limited identification requirement than the overbroad prohibition of pamphleteering present in the case.

Justice Ginsburg's concurring opinion also notes that "we do not thereby hold that the State may not, in other larger circumstances, require the speaker to disclose its interest by disclosing its identity."

Justice Thomas suggested that the only issue is whether the First Amendment, as originally understood, protects anonymous writing. He argued that it does, citing specific examples of anonymous political pamphleteering from the early republic. However, he also noted the historical precedent for a policy of refusing to publish unless the author provides his identity to be "handed to the publick if required." FN13

> FN13. Justice Thomas quoted from the Massachusetts Centinel, October 10, 1787.

***10** Justice Scalia and Chief Justice Rehnquist dis-

sented, not finding adequate evidence as to the original intent of the framers of the Constitution and noting that in circumstances such as those presented in *Bates* and *NAACP v. Alabama*, existing law adequately protected litigants. Justice Scalia observed that the record did not contain evidence of threats, harassment or reprisals and that the court had previously rejected the notion of a "generalized right of anonymity in speech," *citing Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed.2d 1190 (1913). Justice Scalia further wrote that the court's protection for anonymous speech did not establish a clear rule of law. Justice Scalia was particularly concerned with how much easier it would be to circulate derogatory information, though perhaps not actionably false, if one could remain anonymous.

In conclusion, Justice Scalia stated "I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid threats, harassment or reprisals, the First Amendment will require an exemption from the Ohio law ... [b]ut to strike down the Ohio law ... will lead to a coarsening of the future."

Despite the Supreme Court's having found constitutional underpinnings for its creation of a right to anonymity, and notwithstanding Justice Scalia's fears concerning the logical consequences of such a holding, the court's holding was, in fact, very limited. It held only that Ohio's law imposing a fine on an individual leafleteer in an election who did not disclose her identity violates the First and Fourteenth Amendments-that is, that such leafleting is political speech and is therefore protected as core free speech.

Justice Ginsburg observed that the ruling would not necessarily apply "in larger circumstances" and Justice Scalia offered that "there is no doubt, for example, that laws against libel and obscenity do not violate 'the freedom of speech' to which the First Amendment refers...." And, as noted above, the majority reiterated several times in the opinion the implication that the rule would not necessarily hold where fraud or libel was involved or where the message is false or misleading.

From the *McIntyre* opinion and from the other cases discussed above, it can be concluded that although the First Amendment includes, in some circumstances (at least where truthful political speech is involved (*McIntyre*), or there are imminent threats of reprisal (*Bates*)), a limited right of anonymity exists (subject, perhaps, to some protective disclosure) (Stegall), such a right does not exist where the statements made are libelous, misleading, conducive to fraud or defamatory.[FN14]

FN14. It seems clear enough that the "larger circumstances" of which Justice Ginsburg wrote must include, at the very least, these categories.

3. Anonymity on the Internet

***11** Applying defamation law to internet communications "helps to make meaningful discourse possible. Defamation law has a civilizing influence on public discourse: it gives society a means for announcing that certain speech has crossed the bounds of propriety." *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855 (2000) and sources cited there. "Defamation law has the potential to curb the excesses of internet discourse and to make internet discourse not just more civil, but more rational as well." *Id.* "Indeed, the widespread use of pseudonyms online is responsible for many of the abuses perpetrated by internet speakers. But revelation of identity has negative consequences as well-it may subject the user to ostracism for expressing unpopular ideas, invite retaliation ..." or have other negative consequences. *Id.*

In consideration of these competing interests,

courts have, therefore, taken various, but similar, approaches to the problem. In *Columbia Ins. Co. v. seescandy.com,* 185 F.R.D. 573 (N.D.Cal.1999), the plaintiff corporation filed a trademark infringement suit against the unknown owners of an allegedly infringing website. The court ruled that in addition to providing sufficient information to show the court's jurisdiction the plaintiff must identify all previous steps taken to locate the "elusive defendant" in order to show that the party had attempted to comply with the requirements of service of process. In addition, the court required that the plaintiff show that his suit could withstand a motion to dismiss and, finally, plaintiff was required to file a discovery request with the court justifying the need for the information requested.

In *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va. Cir. Ct.2000), a corporation attempted to learn the identities of anonymous internet posters. That court required mover to show that it had a "legitimate, good faith basis" for the suit and that the subpoenaed information was needed to advance that claim.

In *Doe v. 2TheMart.Com, Inc.*, 140 F.Supp.2d 1088 (2001), the court, in Washington, after noting the decisions of the California court in *seescandy.com* and of the Virginia court in *America Online,* adopted a four-part test for determining whether a subpoena to an internet service provider seeking identification of anonymous posters would be allowed. The four factors the court set forth are:

1. Whether the subpoena seeking the information was issued in good faith and not for an improper purpose?

2. Whether the information sought relates to a core claim or defense?

3. That the identifying information is directly materially relevant to the claim or defense.

4. That information sufficient to establish the claim or defense is unavailable from any other source.

Finally, two cases in New Jersey considered the issue. In *Dendrite Intern., Inc. v. Doe No. 3,* 342 N.J.Super. 134, 775 A.2d 756 (2001) and *Immunomedics, Inc. v. Doe,* 342 N.J.Super. 160, 775 A.2d 773 (2001), both cases involving corporations seeking the identity of unidentified users of internet service providers' message boards, the court held that it would require a showing of a prima facie case against the anonymous defendants, that is, according to the court, that the action could withstand a motion to dismiss.

***12** None of these tests seems to be perfectly satisfactory. For example, the requirement in *seescandy.com* and in *2TheMart.Com* that the information is unavailable from any other source, is, it seems to me, irrelevant. The issue is the balancing of a plaintiff's right to protect his good name versus the defendant's First Amendment right to free speech. The need to balance those interests and to protect free speech is no less present where plaintiff attempts to learn the identify by some other "available means" or where he attempts to learn it by subpoena. Indeed, it seems that a defendant's First Amendment rights are more likely to be protected by the court where a subpoena is sought than where a plaintiff attempts to learn the identity of the party "from any other source." Next, the requirement set forth, for example, in *2TheMart.Com* that the information must relate to a core claim or defense and be directly materially relevant is simply a rote exercise in a case such as the present one where the information is obviously needed to identify the defendant in the case. The exercise accomplishes nothing. Finally, the standard set forth in the cases which cast the inquiry as whether or not the subpoena was issued "in good faith," such as *2TheMart.Com* and *America Online* is an inadequate standard for the determination. For a plaintiff may well be in actual subjective good faith in filing the suit believing he has a strong case when, in fact, he may have no case at all.

Finally, the *Dendrite* and *Immunomedics* cases come closest to setting forth a useful standard by

requiring a showing of the ability to withstand a motion to dismiss or to prove a prima facie case before a subpoena is issued. Yet the standard of withstanding a motion to dismiss is also inadequate, for the requirement there is only that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.R.Civ.P. 12(b)(6); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (1999). Conversely, requiring a prima facie case is too burdensome, for the plaintiff may not be able to make out a prima facie case at this early stage of the proceedings where even the identity of the defendant is unknown and no discovery has taken place.

Therefore, I believe that the proper standard should be, depending upon whether the statements involve public concern or private concern, a showing of at least a reasonable probability or a reasonable possibility of recovery on the defamation claim. Although a "reasonable probability" FN15 would be the preferred standard, requiring a standard higher than a reasonable possibility FN16 of recovery is unworkable in cases where the plaintiff is a public figure. In such cases, it may not be known whether the burden of proof (of actual malice) can be satisfied until the defendant's identity is disclosed and his testimony taken.

FN15. Regarding reasonable probability, *see, for example, Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

FN16. Regarding reasonable possibility, *see* discussion in Elkin, Jeffrey R., "Cybersmear: The Next Generation" 10-AUG *Bus.L.Today* 42.

Such an approach has been taken before. For example, California's law of defamation requires a showing of a probability of success on the merits where free speech on a public issue is involved. *See* discussion in *Global Telemedia Intern., Inc. v. Doe 1,* 132 F.Supp.2d 1261 (C.D.Cal.2001). FN17

FN17. Examples of other suits seeking to compel disclosure of the identity of anonymous or pseudonymous on-line participants include the following non-exclusive list, as compiled by Babcock, Powell, Schacter, Schell and Schulz, *supra: Quad/Graphics, Inc. v. Southern Adirondack Library Sys.,* 174 Misc.2d 291, 664 N.Y.S.2d 225 (Sup.Ct.1997); *McVeigh v. Cohen,* 983 F.Supp. 215 (D.D.C.1998); *HealthSouth Corp. v. Krum,* No. 98-2812 (Pa. C.P. Centre County 1998); *Itex Corp. v. French,* No. 98-09-06393 (Cir.Ct.Ore.); *Technical Chem. and Prod., Inc. v. John Does 1 through 10,* No. 99-004548 (Fla.Cir.Ct.1999); *Raytheon Co. v. John Does 1-21,* No. 99-816 (Mass. Superior Ct.1999); *Xircom, Inc. v. John Does,* No. 188724 (Cal. Superior Ct.1999); *Hvide v. John Does 1 through 8,* No. 99-22831 (Fla. County Cir. Ct.1999); *John Doe a/k/a Aguacool_2000 v. Yahool, Inc.* (C.D.Cal.2000); *Rural/Metro v. John/Jane Does 1 through 4,* 00-21283 EAI (N.D.Cal.2000); *2TheMart.Com, Inc. Securities Litigation,* No. Misc. SACV-9901127 DOC (W.D.Wash.2001).

***13** In order to determine whether or not there is a reasonable possibility or probability of success on the merits of the defamation claim, it is necessary that it first be determined whether the plaintiff is a public official or public figure or is instead a private figure and, second, whether the speech at issue is of public concern.

PUBLIC OFFICIAL OR PUBLIC FIGURE

Curtis Pub. Co. v. Butts, supra, extended the New York Times rule requiring proof of actual malice in a suit against a public official to include also public figures. The court described public figures as "nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events

in areas of concern to society at large." ' The court then explained that "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." FN18 [More important,] "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." No such assumption is justified with respect to a private individual. *Milkovich v. Lorain Journal Co., supra, quoting Gertz, supra,* 94 S.Ct. at 3009.

> FN18. The ability to respond effectively has certainly been lessened with the advent of the Internet. As Eric Dezenhall, a media relation consultant, has observed: "... the anonymity of the internet makes it very difficult to supply cyber gossips with correct information. Where will I send it? Internet attackers rarely leave a return address. With a traditional media attack, I know whom to call. The internet provides little or no recourse." Dezenhall, Eric, *Nail 'Em!: Confronting High-Profile Attacks on Celebrities & Businesses,* 160, Amherst, N.Y., Prometheus Books (1999).

Where a public figure voluntarily engages in a public controversy, he is often referred to as a "limited public figure." *See, for example,* concurring opinion in *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). As such, he has subjected himself to somewhat greater public scrutiny and has a lesser interest in privacy than an individual engaged in purely private matters. *Id.*

Baxter, at all relevant times, has been the Vice-President for University Advancement and External Affairs of the University of Louisiana at Monroe ("ULM"), Executive Director of the University of Louisiana at Monroe Foundation (a private, not-for-profit foundation), and a member of the ULM administration. As ULM's Vice-President for University Advancement and External Affairs, his primary job responsibilities, according to the affidavit he filed in this case, are to manage the university's office of development, alumni relations, conference center, public affairs, and the university's performing arts series. He has no direct or indirect supervisory responsibility over any university faculty members in their academic capacities. Only the director of performing arts reports directly to him.

Comparing Baxter to the parties involved in other cases is helpful. Sullivan (of *New York Times v. Sullivan*) was a city commissioner. Therefore, he was a public official. Butts, whose case extended the *New York Times* rule to public figures, was the athletic director of the University of Georgia who had overall responsibility for the administration of its athletic program. Georgia is a state university, but Butts was employed by a private corporation. He was considered by the Supreme Court to be a public figure who "commanded a substantial amount of independent public interest at the time of the publications." He was a public figure by virtue of his public position, notwithstanding that he had not inserted himself at the forefront of a public controversy.

***14** I see little difference in Sullivan, who was an elected city commissioner, and Baxter, an appointed university vice-president. Baxter is, in my opinion, a public official because the public has an interest in the adequacy of his job performance and he has voluntarily exposed himself to an increased risk of injury by choosing to serve the public good. *See Dun & Bradstreet,* 472 U.S. 749, 105 S.Ct. 2939 at 2943, 86 L.Ed.2d 593. If not a public official, Baxter is at least a public figure, even though he has not thrust himself to the forefront of this controversy. Butts was held to be so as athletic director, even though he was not employed by a governmental agency or the university at all. Baxter, on the other hand, has duties somewhat comparable to Butts' and is employed by the State, through the university.

I find Baxter to be a public official.

DID THE PUBLICATION INVOLVE A "MATTER OF PUBLIC CONCERN?"

This brings us to an analysis of whether the allegations made in the only articles authored (at least in part) by mover Doe which have been presented to the court, deal with matters of public concern.

Whether speech addresses a matter of public concern must be determined by its content, form and context, as revealed by the whole record. *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684 at 1690, 75 L.Ed.2d 708 (1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra.* However, "despite such directions, and because of the case-by-case analysis required, the definition of the term 'public concern' is far from clear-cut." *Kirkland v. Northside Independent School Dist.,* 890 F.2d 794 (5th Cir.1989), *cert. den.,* 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990). It is not every controversy of interest to the public which is a public controversy. *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). The Fifth Circuit has held that where speech complains of misbehavior by public officials, however, the speech does implicate public concern. *Brawner v. City of Richardson, Tex.,* 855 F.2d 187 (5th Cir.1988). Compare *Coughlin v. Lee,* 946 F.2d 1152 (5th Cir.1991) ("despite the public context and form in which they released this information, its content did not address a matter of public concern.")

A review of the articles of which Baxter complains is therefore necessary. One of the articles is entitled "Baxter Cracks" [Exhibit B]. It alleges that Baxter is one of the "sewer staff" of the university president and that he has "begun to crack under the strain." Although the article references delinquent loans and bad debt, none of those allegations seems to be directed to Baxter, but rather they appear to be directed to the university president Swearingen. The article goes on to allege that "Baxter's job is to make sure that Swearingen's incompetence and ULM's state of decline under Swearingen are kept under cover" and suggests that reporters for a newspaper have "uncovered a few issues and this apparently causes Baxter to lose sleep." It alleges that Baxter was upset at one of that newspaper's stories, that Baxter used "colorful expletives," that he physically blocked a radio reporter's entry into a meeting at the university and that he became "so distraught that he had to be escorted from the building." Finally, the article refers to him as "vice-president of excremental affairs" and repeats that "he is cracking under the strain." In the affidavit filed in this lawsuit, Baxter denies all of those claims. In the other article [Exhibit C], Baxter is accused of not being forthright about the use of funds of the athletic scholarship foundation and is charged with an implicit (by his silence) admission of wrongdoing on the part of the ULM administration.

***15** Some of the statements in the only two articles presented to the court for consideration at this point appear to set forth matters of legitimate public concern, that is, either the expenditure and management of public funds or misconduct. For example, it is suggested that newspaper reporters have "uncovered a few issues" which strongly implies wrongdoing. The author alleges that Baxter was keeping wrongdoing "under cover" and that he was upset about a newspaper story concerning delinquent loans.

Some of the comments appear to be related only to private concerns,[FN19] for example, that "Baxter cracks," or "is cracking under the strain," that he used "colorful expletives," (implying unfitness) and that he became "so distraught that he had to be escorted from the building."

> FN19. Some of the comments could involve elements of both personal interest and public concern. That alone, however, does not foreclose a finding that the speech communicates on a matter of public concern. *Thompson v. City of Starkville, Miss.,* 901 F.2d 456 (5th Cir.1990).

The other comments, however, appear to be only vituperative babble which do not even purport to

further the goal of robust public discussion and can be considered to be mere hyperbole,[FN20] which include, for example, that plaintiff is a member of the "sewer staff" and is Vice-President of "excremental affairs".

> FN20. Hyperbole is extravagant exaggeration. Hyperbole, not being statement of fact, is not actionable. *See Milkovich v. Lorain Journal Co.,supra*, and cases cited therein, including *Greenbelt Co-op. Pub. Ass'n, Inc. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

I find, therefore, that some of the statements attributed to Mover Doe and any other contributors or authors of *Truth@ULM.com* do involve matters of public concern, some involve matters of private concern and some are mere hyperbole. Therefore, for purposes of this analysis, this case involves a public official plaintiff and speech both of public concern and of private concern. In order to recover for defamation, plaintiff must prove, at least as to the speech of public concern, that the statements are false. *Philadelphia Newspapers, Inc. v. Hepps, supra.*[FN21] As in *New York Times*, plaintiff is a public official suing on statements regarding public concerns and therefore he must prove[FN22] those statements were made with actual malice (regardless of the fact that the defendant is not a traditional media defendant).[FN23] As to plaintiff's claims regarding statements which are not of public concern, however, there is no requirement of a showing of actual malice.[FN24] *See Dun & Bradstreet, Inc. v. Greenmoss, Inc., supra.*[FN25]

> FN21. In *Hepps*, the Supreme Court held only "that at least where a *newspaper* publishes speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false." I see no difference here in a newspaper publishing the speech or an Internet user with a modem publishing the speech. As Justice Thomas noted in his concurring opinion in *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995): "When the Framers [of the Constitution] thought of the press, they did not envision the large corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee (citations omitted)." He concluded "... regardless of whether one designates the right involved here as one of press or one of speech, however, it makes little difference in terms of our analysis which seeks to determine only whether the First Amendment, as originally understood, protects anonymous writing."
>
> It has also been observed that "[t]he internet makes anyone with a modem a reporter, a profession once held in such high esteem that it was Superman's day job," Dezenhall, Eric, *Nail 'Em!: Confronting High-Profile Attacks on Celebrities & Businesses*, 157, Amherst, N.Y., Prometheus Books, 1999, and that "computers offer us the appearance of journalism without the hard work." *Id.* at 157. "[Computers] allow people to traffic in allegation without confirming the source of their information because there is no journalistic imperative to verify computerized information the way there is with the print and broadcast media." *Id.* at 157-8.
>
> FN22. The standard of proof is clear and convincing evidence. *Milkovich v. Lorain Journal Co.,supra.*

FN23. In *New York Times*, the court held: "We hold today that the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their unofficial conduct."

FN24. Neither is there a requirement of a showing of culpability or fault under the *Gertz* standard, since, even though plaintiff is a public official, he is not suing regarding statements of public concern. *Gertz* dealt with a private figure suing regarding statements involving matters of public concern.

FN25. *Dun & Bradstreet* involved a private plaintiff (not a public official or figure) and matters of private concern. When matters of private concern are the subject of the inquiry, the fact that plaintiff is a public official is irrelevant.

In this case, there is a reasonable probability that plaintiff will likely prevail on a claim of defamation concerning some of the statements on matters of private concern.[FN26] In order to prevail in a defamation action under Louisiana law, a plaintiff must prove four elements:

FN26. As mentioned earlier, some of the statements amount only to hyperbole.

1. A false and defamatory statement concerning another;

2. An unprivileged publication to a third party;

3. Fault (negligence or greater) on the part of the publisher;

4. Injury.

Fitzgerald v. Tucker, 98-2313 (La.6/29/99), 737 So.2d 706 (La.1999). "[A] communication is defamatory if it intends to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person or otherwise exposes a person to contempt or ridicule. (Citations omitted.) Thus, a communication which contains an element of personal disgrace, dishonesty or disrepute undoubtedly satisfies the definition of defamatory." *Id.* "Defamation involves the invasion of a person's interest in his or her reputation and good name." *Id.*

***16** The Louisiana Supreme Court has explained that "in addition to false defamatory statements of fact and statements of opinion made with actual malice which imply false defamatory facts, yet another type of statement is actionable under Louisiana's law of defamation. A plaintiff may recover for defamation by innuendo or implication which occurs when one publishes *truthful* statements of fact and those truthful facts carry a false defamatory implication about another." (Citations omitted.) "In other words, defamatory meaning can be insinuated from an otherwise true communication. *Schaefer v. Lynch*, 406 So.2d 185 (La.1981)." *Fitzgerald, supra.* However, truthful facts which carry defamatory implication are only actionable under Louisiana law if the statements regard a private individual and private concerns. *Id.*

There is adequate evidence before the court that plaintiff is likely to be able to prove the falsity of some of the statements made. In addition, those statements appear to be defamatory in that they intend to harm the reputation of Baxter and expose him to contempt or ridicule. There has certainly been publication, and fault has been shown (as will be discussed below with regard to the public concern statements), and plaintiff has reasonably alleged injury.

With regard to the statements on matters of public concern, there is adequate evidence in the record of the reasonable possibility of proof of malice in the form of the intentional publication of false defamatory statements or the reckless disregard for their truth or falsity. For example, some of the hyperbole, (for example, referring to plaintiff as a mem-

ber of a sewer staff) demonstrates an underlying animus that can only result in a finding of malice as to all of the statements. Personal comments that Baxter has "begun to crack" and was "upset" also show malicious intent as does the intentional incorrect reference to his office. Additional evidence as to malice must come from further development of this case in the form of discovery and trial testimony and, importantly, the testimony of the authors, including Doe. Therefore, as pointed out above, it is impossible at this point in the proceeding to predict the probability that plaintiff will succeed in proving actual malice. That a reasonable possibility of success exists, however, is clear.

Therefore, I find that there being a reasonable probability of a finding of defamation with regard to the statements on matters of private concern and a reasonable possibility of a finding of defamation with regard to the matters of public concern, mover is not entitled to assert the defense that the statements were privileged as free speech protected by the First Amendment. Because the statements are not protected by the First Amendment, neither does mover have a right under the First Amendment to proceed anonymously by way of intervention. *McIntyre, supra.*

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the stay [Doc. # 12] of my October 18, 2001 order [Doc. # 6] is hereby LIFTED and no longer in effect. The October 18, 2001 order is MODIFIED in the following respect: Homestead Technologies, Inc. is HEREBY ORDERED and COMMANDED to respond fully, in writing, under oath and no later than December 27, 2001 to the interrogatories and requests for production of documents propounded by plaintiff.

***17** IT IS FURTHER ORDERED that the motion to intervene anonymously by J. Doe [Doc. # 8] is DENIED.

IT IS FURTHER ORDERED that the complaint for relief pursuant to the First Amendment to the U.S. Constitution and for injunctive relief attached to Document # 8 is DENIED.

THUS DONE AND SIGNED at Alexandria, Louisiana, this *19th* day of December 2001.

W.D.La.,2001.
In re Baxter
Not Reported in F.Supp.2d, 2001 WL 34806203 (W.D.La.)

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