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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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SI03, INC., Plaintiff, vs. BODYBUILDING.COM, LLC. Respondent.[1]	**Misc. Case No. CV 07-6311-EJL** **(Civil Case No. 07-C-3266** **Northern District of Illinois)** **OPPOSITION OF RESPONDENT BODYBUILDING.COM, LLC TO MOVANT'S MOTION TO COMPEL**

[1] Bodybuilding.com, LLC is misidentified as a "Defendant" in the caption of the Motion. Bodybuilding.com, LLC is not a defendant in this or the underlying case, but rather is a Third Party from whom Movant (a plaintiff in an Illinois Case, 07 C 3266, N.D. Ill.) is attempting to Compel Production of Documents regarding 22 other "Fourth" Parties.

I. INTRODUCTION

Movant's Motion is a thinly-disguised attempt to chill Constitutionally-protected Anonymous Speech and thwart discussion of legitimate subjects of debate in a public forum. This "[a]nonymity is a shield from the tyranny of the majority," and a fundamental right protected by the Constitution and affirmed by the Supreme Court.[2]

Bodybuilding.com, LLC ("Bodybuilding.com") is an Idaho company servicing the interests of the international bodybuilding community through its popular www.bodybuilding.com website. As part of its site, Bodybuilding.com hosts an interactive worldwide free message board (the "Forum"), open to the public, where those with shared and similar interests can freely exchange thoughts, ideas, recommendations, advice, etc., on issues affecting this community.[3] This Motion is an attack on that community and on the fundamental right to Anonymous Speech. It seeks to use the power of the Federal Judiciary to compel the names of anonymous Forum speakers who offer opinions contrary to that of SI03, Inc. in order to quash, through threats, litigation (or otherwise), any criticism of its company or products.

II. FACTUAL BACKGROUND

Movant filed a Complaint in the District Court for the Northern District of Illinois against 31 unnamed "John Doe" individuals and 5 unnamed "John Doe" companies allegedly responsible for posting, under pseudonyms, allegedly defamatory comments about Movant

[2] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), quoting John Stuart Mill, *On Liberty and Considerations on Representative Government I* 3-4 (R.B. McCallum ed., 1947) (finding unconstitutional a state law prohibiting anonymous writing and distribution of information intended to influence voters); *Watchtower Bible v. Village of Stratton,* 536 U.S. 150 (2002) (finding unconstitutional ordinance prohibiting door-to-door solicitation without a permit, as identification requirement prevented anonymous speech).

[3] This Forum, like electronic message/bulletin boards and chat rooms, are unique creatures, developed as conduits for the free exchange of ideas and providing an immediate opportunity for any member of the public to criticize, respond, or disagree with the statement by engaging in their own counter-speech to counteract any negative affect of unflattering speech.

and/or its products on the Forum.[4] Three days later, the Illinois Court, apparently *sua sponte*, granted Movant *ex parte* relief, in the form of expedited discovery, to issue Subpoenas to secure the 36 "Does" identities.[5]

More than six (6) weeks later, Movant finally issued an "expedited" Rule 45 Subpoena to Bodybuilding.com, seeking the identity of only 27 of the 31 individual "John Does."[6] Bodybuilding.com objected to several procedural infirmities in the Subpoena and to the lack of specificity as to how at least 15 of the 27 pseudonyms had allegedly defamed SI03, Inc.[7] Movant cured some of the infirmities and issued a new subpoena, now seeking 30 identities.[8] After further objection,[9] Movant filed this Motion (four months after being granted "expedited discovery"), now, inexplicably, seeking only 22 pseudonym identities.

Movant's behavior herein should make the Court highly skeptical of its motives and representations. Movant has: (1) despite having specific printouts of all allegedly defamatory statements, failed to attach any to the Complaint; (2) used selective quotes and misleading characterization of statements in the Complaint and Motion to Compel; (3) failed to notify

[4] *See* Pl. Ex. "A1."

[5] *See* Pl. Ex. "A2" (Notice of Docket Entry, dated June 13, 2007). Bodybuilding.com was never privy to the original action where Judge Castillo granted expedited discovery without any Motion, Affidavit, or evidence to examine.

[6] *See* Pl. Ex. "D1" (July 25, 2007 Subpoena). Movant has never explained the reason for the removal of four (4) pseudonymous speakers, or why it waited six (6) weeks to issue an "expedited discovery" subpoena.

[7] *See* Pl. Ex. "B2" (Bodybuilding.com Objection Letter of Aug. 8, 2007). The sole reference in Movant's Complaint to 15 of the pseudonyms, "Bloute," "Lonny," "BuckyeyMuscle," "cakedonkey," "Coulaid," "dito," "Dosquito," "EMISGOD," "Ephedra," "jkeithc82," "musclescient," "Patrick Arnold," "OneBetter," "Truth Speaker," and "Super Freak 420" is a vague statement in Paragraph 109 that these speakers made unspecified statements on the Forum to "dissuade consumers and others from purchasing SI03 products and to damage, diminish, and destroy the credibility of SI03 among its customers and the consumer market." *See* Pl. Ex. "A1."

[8] *See* Pl. Ex. "D2" (August 9, 2007 Subpoena). Again, no explanation was provided for the addition of three (3) new pseudonyms.

[9] *See* Pl. Ex. "B3" (Bodybuilding.com Second Objection Letter of August 23, 2007).

Bodybuilding.com, prior to the "clarification" Hearing[10]; (4) added allegedly defamatory statements to the Motion to Compel not already in the Complaint; and (5) abused the Subpoena power by issuing *ex parte* subpoenas for the identity of 30 persons, yet when filing its Motion, inexplicably removed nine (9) of the speakers from the list.[11]

III. LEGAL ARGUMENT

A. THERE IS NO STANDARD THAT THIS COURT MUST FOLLOW

There is no Supreme Court, Ninth Circuit, other Court of Appeals, Idaho Federal or State Court published Opinion on point for the issue at hand (compelled disclosure of allegedly defaming anonymous Internet speakers on message boards). However, this issue is a hot topic in the legal and Internet literature[12] and a few State Appellate and Federal Trial Courts are beginning to develop and adopt tests and standards by which to determine whether an Order to Compel is warranted. There are two leading cases setting forth such tests - *Cahill* and its precursor *Dendrite*.[13] Although neither are binding herein, and while Movant suggests the

[10] Bodybuilding.com was never notified of the August 22, 2007 Clarification Hearing, despite Plaintiff's Counsel knowing the fax number, email address and phone number for Respondent's Counsel. In fact, a copy of the Motion for Clarification, filed Aug. 17, 2007 (Pl. Ex. "A3") was sent only via regular mail (postmarked Aug. 18, 2007) and not received by Counsel until August 27, 2007, five (5) days after the Hearing.

[11] Movant's McCarthy-like moving-target number of identities sought is evidence of Movant's bad faith. For example, Movant's numbers range from as high as 265 different pseudonyms (*see* Bodybuilding.com Ex. "A-1") to their Motion to Compel, requesting only 22 pseudonyms.

[12] *See e.g.* Ryan M. Martin, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U.Cin. L. Rev. 1217 (2007); Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U.Ill. J.L. Tech & Pol'y 343 (2006); Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 Comm. L. & Pol'y 405 (2003); Lyrissa Barnet Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); David Sobel, *The Process that "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 Va. J.L. & Tech. 3 (2000).

[13] *Doe v. Cahill*, 884 A.2d. 451 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001).

weaker *Cahill* Standard[14] should govern, Bodybuilding.com submits, respectfully, that the Court follow the approach that makes protection of the fundamental right to anonymous speech paramount.

1. **The *Dendrite* Standard Protects Against Unwarranted and Harmful Disclosure of Anonymous Internet Speech**

The standard set forth in *Dendrite International, Inc. v. Doe No. 3*,[15] most complies with the principles of protecting First Amendment speech, yet draws limits at speech beyond protections afforded in the Constitution. Specifically, in order to allow a Court to Compel the disclosure of identities of anonymous/pseudonymous speakers, the *Dendrite* Standard requires four (4) things: (1) the plaintiff must undertake efforts to notify the anonymous speaker that they are subject of a subpoena (including a posting on the same message board as the alleged actionable speech occurred), and withhold taking action in order for the anonymous speaker to file an opposition; (2) the plaintiff must set forth the exact statements made which allegedly constitute actionable speech; (3) the plaintiff's Complaint must make out a *prima facie* cause of action against the anonymous speaker; and (4) even if plaintiff has presented a *prima facie* case, the Court must still balance defendant's First Amendment Right of Anonymous Free Speech with the relative strength of the case and the need for disclosure in order for the plaintiff to

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[14] *Cahill* is cited in no more than six published Opinions, only twice in Federal Court Opinions and only four times dealing with the specific issue of anonymous Internet speech. *See Best Western Intern., Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, *6 (D. Ariz. Jul 25, 2006) (movant failed to make sufficient showing under *Cahill* standard); *McMann v. Doe*, 460 F. Supp. 2d 259, 267 (D. Mass. 2006) (questioning *Cahill* standard as not requiring a *prima facie* case by showing malice, clearly contradictory to the First Amendment); *Lassa v. Rongstad*, 718 N.W.2d 673, 686 (Wis. 2006) (rejecting *Cahill* on account of setting standard too low; may chill anonymous postings); *Reunion Industries Inc. v. Doe 1*, No. GD06-007965, 2007 WL 1453491 (Pa.Com.Pl. 2007, Mar 05, 2007) (denying disclosure of identities under summary judgment standard).

[15] 775 A.2d 756 (N.J. Super. 2001).

prevail.[16] This *Dendrite* test provides maximum protection to the anonymous Internet speaker, yet if a legitimate cause of action exists, plaintiff is capable of easily meeting its burden.

2. **The Weaker *Cahill* Standard Ignores First Amendment Concerns**

In the other leading case, *Doe v. Cahill*,[17] the Delaware Supreme Court substantially diluted the *Dendrite* standard by eliminating the balancing of First Amendment protections against a plaintiff's perceived need. *Cahill*'s Standard merely requires a plaintiff to (1) plead sufficient facts to withstand a Summary Judgment Motion; and (2) "undertake reasonable efforts to notify the anonymous defendant of the discovery request and must withhold action to all the defendant an opportunity to respond."[18] Plaintiff therein failed to meet the summary judgment standard, as the speech was determined "unfounded and unconvincing opinion" and thus incapable of defamatory meaning.[19]

3. **Courts Rarely Compel Disclosure in These Cases**

Movant has failed to cite any, and Respondent has been able to locate only five (5) reported decisions favoring disclosure of anonymous identities under any circumstance,[20] each

[16] *Dendrite Int'l, Inc.*, 775 A.2d at 760-61. Many other courts have cited *Dendrite* with approval. *See e.g. Best Western Intern., Inc., v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, *5 (D. Ariz. July 25, 2006) (accepting *Dendrite* and including additional expectation of privacy factor); *Highfields Capital Mgmt., L.P. v . Doe*, 385 F.Supp. 2d 969, 974 (N.D. Cal. 2005) (discussing *Dendrite* positively in adopting test that requires evidentiary support for all essential facts and that balance of harms weighs in plaintiff's favor for disclosure); *In re Baxter*, No. 01-00026-M, 2001 WL 34806203, *11 (W.D.La. Dec. 20, 2001) (citing *Dendrite* Standard positively in creating its own "reasonable probability" of defamation standard).

[17] 884 A.2d. 451 (Del. 2005).

[18] *Cahill*, 884 A.2d. at 461 (in the internet context, plaintiff must post a message notifying the anonymous defendant of the discovery request on same message board).

[19] *Id.* at 467.

[20] *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 March Term 2004, 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006) (Judge expressing very parochial view of anonymous internet speech, rejected both *Cahill* and *Dendrite*, relied on the Pennsylvania Rules of Civil Procedure. The issues were clearly distinguishable in that the defendant had the names available and in his possession, the Court had already found defamation *per se*, and there

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clearly distinguishable on facts ranging from a case of copyright infringement (not defamation),[21] a case where the "Doe" itself sought permission to intervene against Plaintiff,[22] a simple ISP rather than a forum encouraging speech,[23] and a case stemming from clear violations of confidentiality agreements and breached duties of loyalty to that employer.[24]

4. **Movant Fails Both *Dendrite* AND *Cahill* Standards**

Movant has failed to meet most elements required by *Dendrite*. Specifically, (1) Movant admits to not notifying the "Does" as required by *Dendrite*,[25] (2) Movant's Complaint contains only "selected" quotes and paraphrases of statements allegedly made by pseudonymous speakers;[26] (3) Movant has not presented a *prima facie* case for defamation or trade libel because (a) none of the statements are "of and concerning" Movant, (b) the "innocent construction" rule precludes liability, and/or (c) the existence of absolute opinion and truth defenses; (4) Movant does not need disclosure of the information for at least eight (8) of the speakers in order to move

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existed no bad faith by plaintiff or unreasonable burden on the defendant in producing the information).

[21] *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-567 (S.D.N.Y. 2004).

[22] *In re Baxter,* No. 01-00026-M, 2001 WL 34806203, at *11 (W.D.La. Dec. 20, 2001).

[23] *Polito v. AOL Time Warner, Inc.*, No. 03CV3218, 2004 WL 3768897, at *12 (Pa. Com. Pl. Jan. 28, 2004). This is an important distinction from the present case where bodybuilding.com is not simply an ISP retaining user contact data, but rather provides an environment that encourages open and anonymous speech.

[24] *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 778 (N.J. Super. 2001). This is the only known forum/message board case where anonymous speaker identity disclosure was compelled. However, applying *Dendrite*, the speaker was known to be a former employee of plaintiff who had disclosed information that, on its face, was a breach of an employment confidentiality agreement, clearly establishing a *prima facie* case.

[25] *See* Pl. Mot. to Comp. p10, n.2. *See also* Bodybuilding.com Ex. "A" (Decl. of Gary Davis).

[26] Movant's Motion to Compel includes statements not referenced anywhere in the Complaint.

its case forward;[27] and (5) the fundamental Constitutionally-protected right to anonymous speech so far outweighs Movant's interest that a balancing falls squarely in Bodybuilding.com's favor.

Even if the weaker *Cahill* Standard[28] is used, application of same will likewise prove fatal to the Motion because of Movant's: 1) failure to plead special damages to maintain a defamation *per quod* claim; 2) failure to identify the speech as "of and concerning" Movant; 3) application of the "innocent construction" rule; and 4) the absolute defenses of opinion and truth. Movant also fails to meet the other element of *Cahill* where, although Movant had access to and regularly posted on the Forum under the moniker "SI03 Board Rep," it admits a complete failure to post any such notice as required.[29]

In addition, many of the dangers posited in *Cahill* are readily apparent here. In *Cahill*, the Court warns that revelation of the identity of anonymous speakers may subject that speaker to ostracism for voicing unpopular views, invite retaliation from those he criticizes or subject the speaker to revenge or retribution.[30] This fear looms large as prohibitions from speaking negatively about SI03, Inc. or any of its products will no doubt result in slanted/biased set of postings and thus the benefit of an open forum will forever be lost.[31] Those voicing unpopular (or non-SI03-approved) opinions will be pushed from the site or subjected to silence.

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[27] *See infra* Section V.B. (Movant already has contact information for the employers of multiple speakers).

[28] *Cahill* adopts only the first and third elements of the *Dendrite* Standard (notice and summary judgment requirements). *Doe v. Cahill*, 884 A.2d. 451, 461 (Del. 2005).

[29] *See* Pl. Mot. to Comp. p10, n.2.

[30] *Cahill*, 884 A.2d at 457.

[31] *See* Bodybuilding.com Ex. "A" (Declaration of Gary Davis).

B. THE FIRST AMENDMENT PROTECTS ANONYMOUS INTERNET SPEECH OCCURRING ON A FORUM

The First Amendment protection of Anonymous Speech is a vital component to the entire analysis of whether disclosure is appropriate.[32] The Parties agree that "First Amendment protections extend to the Internet" and that "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."[33] The Internet is a virtual marketplace of ideas. It is at the forefront of technology and allows a constant flow of communications from all walks of life, without the burdens of geographical boundaries and with only minimal costs to users. One of the great benefits afforded Internet users is the ability to speak unpopular opinions or voice opposition to those in power via anonymous/pseudonymous speech without fear of retaliation or retribution. Simply, "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."[34] It is the great leveler which empowers the powerless.

Here the Bodybuilding.com Forum provides a community where participants "[a]re expressing their views on issues of interest to [the community] in a forum specifically designed for an exchange of opinions and ideas anonymously. Such speech is entitled to substantial First Amendment protection."[35] Ignoring this protection and outing the anonymous speaker will stifle debate, crush unpopular opinion and subject the public to fears of speaking against the majority

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[32] Bodybuilding.com concurs with much of the case law cited by Movant in support of protecting anonymous speech on the Internet. Respondent applauds Movant's Counsel for his prior work defending anonymous speakers. *See E.Van Cullens v. Doe*, No. 2003 L 000111, Ill. Cir. Ct. 18th Dist., DuPage Cty. Mr. Mudd successfully defended against disclosure therein. It appears, however, that he has joined The Dark Side and now seeks to punish the anonymous speakers he previously championed.

[33] *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001), citing *Reno v. ACLU*, 521 U.S. 844 (1997).

[34] *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

[35] *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006).

or those in power. Anonymous speakers must not be so intimidated so as to engage in self-censoring or worse, simply not comment at all.[36] While the bodybuilding.com Forum members may have bulging biceps, compelling disclosure of their identities could render them 98 pound weaklings in the arena of Free Speech.

Where a Court compels identification of anonymous speakers, and threatens the exercise of this fundamental right, such an Order must be subject to the "closest scrutiny."[37] The Forum is an open, free "forum" allowing the public to freely discuss issues common in the community and is a resource for bodybuilding information (including health and safety information). If forced to disclose identities, other members will fear constant repercussions in the form of lawsuits for any negative comment made regarding any company or product. Members will be afraid to speak and will ultimately abandon the site as it will have lost its ability to allow an open and honest discourse among those with shared interests and experiences.[38]

IV. MOVANT DOES NOT ESTABLISH A *PRIMA FACIE* CASE FOR AT LEAST THREE REASONS

Movant cannot establish a *prima facie* case for defamation *per se*[39] or defamation *per quod*[40] for the following reasons: (1) most statements are not "of and concerning" Movant or

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[36] *Doe v. Cahill*, 884 A.2d. 451, 457 (Del. 2005).

[37] *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). *See* also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (requiring proof of compelling interest, narrowly tailored to pierce the speaker's anonymity).

[38] *See* Bodybuilding.com Ex. "A" (Decl. of Gary Davis).

[39] Defamation *per se* under Illinois law may be defined as statements that: (1) impute commission of a crime; (2) impute a loathsome disease; (3) impute an inability to perform or a want of integrity in the discharge of duty of office/employment; or (4) impute a lack of ability, prejudicing party in his/her trade, profession or business. *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992).

[40] Defamation *per quod* requires plaintiff to plead and prove actual damages of a pecuniary nature ("special damages"). *Republic Tobacco Co. v. N. Atlantic Trading Co.*, 381 F.3d 717, 726 (7th Cir. 2004); *Dubinsky v. United Airlines*, 708 N.E.2d 441, 447 (Ill. App. 1999); *see also* Fed.R.Civ.P. 9(g) (where "items of special damages are claimed, they shall be

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Movant's products; (2) many statements are capable of an "innocent construction"; and (3) valid absolute defenses of "opinion" and/or "truth" exist to the few remaining statements.

A. MANY OF THE ALLEGEDLY DEFAMATORY STATEMENTS ARE CLEARLY NOT "OF AND CONCERNING" MOVANT

Any action for defamation and/or libel, requires the alleged defamatory statement pertain directly to the plaintiff,[41] or in other words, the statement must be "of and concerning" the plaintiff.[42] The overwhelming majority of the statements are not directed to SI03, Inc. or its products and thus are not "of and concerning" Movant.

Specifically, many of the allegedly defamatory statements are aimed at a company named "Syntrax," however, since there apparently exists two (2) distinct companies[43] in the same industry (SI03, Inc. – marketing the "Syntrax" brand of supplements; and "Syntrax Innovations, Inc." - a competitor in the same industry, linked to the production of supplements causing serious health risks and subject of FDA warnings[44]), specific identification of Movant as the target of the statements is often impossible. In fact, Movant has provided sworn statements that SI03, Inc.

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made specifically"). Movant's only allegation of damage is harm to its reputation and sales allegedly attributable to the pseudonymous statements without any specificity. Absent pleading or showing special damages, defamation *per quod* cannot be proven by Movant.

[41] *Restatement (Second) of Torts* § 564 (1977).

[42] *New York Times Co. v. Sullivan*, 376 U.S. 254, 288; *see also Ramos v. City of Peru*, 775 N.E.2d 184, 189 (Ill. App. 2002) ("defamation accrues only to the person against whom the injurious publication was directed.") (emphasis added); *Insull v. New York World-Telegraph Corp.*, 172 F. Supp. 615 (N.D. Ill. 1959).

[43] *See* Bodybuilding.com Ex. "B-8" (Annual Corporate Reports of SI03, Inc. and Syntrax Innovations, Inc., filed with the State of Missouri).

[44] *See* Bodybuilding.com Ex. "B-1" (Nov. 19, 2001 warning).

"has no relation in terms of ownership to ... Syntrax Innovations, Inc." and "is not the same company as Syntrax Innovations, Inc."[45]

B. MANY OF THE ALLEGEDLY DEFAMATORY STATEMENTS ARE CAPABLE OF AN "INNOCENT CONSTRUCTION"

Illinois law also recognizes that "words are not defamatory *per se* if they are reasonably capable of an innocent construction."[46] Courts recognize this is a "difficult standard to meet" and "favors defendants."[47] The allegedly defamatory words must be "considered in context" with the words given their "natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*."[48] Simply put, where there exists two reasonable constructions to a statement, one innocent and one defamatory, the innocent construction will prevail.[49] To overcome this "innocent construction" rule, a plaintiff must show that "no one could think that anyone but [movant] was meant" in the statements.[50] Few jurisdictions anywhere employ an innocent construction rule so favorable to defendants.[51]

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[45] *See* Pl. Ex. "C" ¶¶30-31 (Affidavit of Greg Davis).

[46] *Swick v. Liautaud*, 662 N.E.2d 1238, 1245 (Ill. 1996) (emphasis added).

[47] *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 904 (7th Cir. 2007) (Seventh Circuit recognizing appropriateness of heightened Illinois standard).

[48] *Pope v. Chronicle Pub. Co.*, 95 F.3d 607, 613 (7th Cir. 1996) (emphasis added) citing *Mittelman v. Witous*, 552 N.E.2d 973, 979 (Ill. 1989); *Chapski v. Copley Press*, 442 N.E.2d 195, 199 (Ill. 1982).

[49] *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 925 (7th Cir. 2003) (emphasis added).

[50] *Muzikowski*, 477 F.3d at 904-05.

[51] *Id.* at 907.

C. "OPINION" AND/OR "TRUTH DEFENSES NEGATE ANY DEFAMATION CLAIM

Statements of opinion relating to matters of "public concern" that do not contain provably false propositions are not actionable.[52] Likewise, statements, "expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than ... verifiable facts," are not actionable.[53] Thus unfavorable opinions are still opinions protected by the First Amendment.[54]

V. THE ALLEGATIONS OF DEFAMATION DO NOT WITHSTAND SCRUTINY

A. RESPONDENT HAS NO IDENTITY INFORMATION FOR NINE

Bodybuilding.com does not possess the requested identity or contact information for all persons posting on its Forum. The Registration process on the open "Forum" provides for the voluntary inclusion of actual name and contact information.[55] A thorough search of Respondent's records indicates no contact information for nine (9) of the requested pseudonyms – "Androgenic," "BuckeyeMuscle," "canadaBBOY," "ditto," "Ephedra," "Indenium," "jkeithc82," "RobW," and "uhockey."[56] Thus, even should this Court grant the Motion, Bodybuilding.com simply cannot provide names and/or contact information for the above speakers.

The ability to register and speak anonymously on bodybuilding.com, allows speakers the freedom to openly and honestly engage in discourse. The immediate effect of granting Movant's Motion will be: (1) any Order will be posted to the world on the Forum resulting in a chilling

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[52] *Pope,* 95 F.3d at 613 (7th Cir. 1996) citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

[53] *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

[54] *Action Repair, Inc. v. Am. Broad. Co.*, 776 F.2d 143, 147 (7th Cir. 1985) (finding statements such as "buyer beware when considering dealing with ..." and "people are choosing the wrong repair company...." were honest opinions and non-defamatory).

[55] *See* Bodybuilding.com Ex's. "A" and "A-3" (Decl. of Gary Davis and bodybuilding.com Terms and Conditions, respectively).

[56] *See* Bodybuilding.com Ex. "A" (Decl, of Gary Davis).

effect of causing self-censoring speech; (2) speakers will refrain from speaking for fear of lawsuits; and (3) no one will ever again register their identity on the site in the future. Since Respondent is not a brick-and-mortar business, but existing solely on the internet, and generating revenue from internet traffic visiting other parts of the site, its business model will be severely damaged as this substantial engine of commerce generated by traffic on its site will be nullified.[57]

B. MOVANT ALREADY HAS IDENTITY INFORMATION FOR SIX

Movant seeks the identities of pseudonyms "Aeternitatis," "Bloute," "DWM230000," "Nathan518," "Deserusan," and "Getbustered," but admits that "Aeternitatis," "Bloute," "DWM230000," and "Nathan518," are representatives of specific SI03, Inc. competitors, namely Molecular Nutrition, Serious Nutrition Solutions, MAN Sports, and Designer Supplements.[58] In addition, postings by pseudonyms "Deserusan" and "Getbustered" clearly indicate affiliations with competitors Gaspari Nutrition and Molecular Nutrition, respectively.[59]

Despite knowing that at least these six (6) pseudonyms are "representatives" of specific competitors, Movant continues to burden Bodybuilding.com for the same information it has available elsewhere. In fact, Movant's own July 9, 2007 posting under pseudonym "SI03 Board Rep" indicates an intent only to go after competitors rather than individuals:

> we are not going after the average consumer. We are only interested in people affiliated with other supplement companies. We are not trying to infringe on first amendment rights; the

[57] *See* Bodybuilding.com Ex. "A" (Decl. of Gary Davis).

[58] *See* Pl. Ex. "C" (October 19, 2007 Aff. of Greg Davis, ¶¶ 19-21, 23-24). *See also* bodybuilding.com Ex. "B-2" (competitor website printouts).

[59] *See* Pl. Ex's. "E9" and "E16." The signature lines for each posting references: 1) a corporate email address and competitor name; and/or 2) a disclaimer that the views expressed are not necessarily the views of Molecular Nutrition. Both postings clearly list locations upon which Movant can easily obtain the requested information and in fact, are given the name of the company they seek to sue.

> average consumer that is unaffiliated has every right to speak his or her opinion within reason.[60]

Imposing the burden and inconvenience on a Third Party is only appropriate where the information sought, is "unavailable from any other source."[61] Thus, armed with the identities of competitors for whom the pseudonym is a representative (and apparently intending only to go after these competitors), there is no reason why Movant should be subpoenaing Bodybuilding.com, but instead should be subpoenaing (and/or suing) its competitors to obtain real names of their representatives.[62]

C. THE REMAINING SEVEN OF TWENTY-TWO DID NOT DEFAME

The postings from the remaining seven (7) speakers are simply not defamatory, libelous or commercially disparaging.[63] Movant's claims fail for one or more of the following reasons: (1) statements are not "of and concerning" Movant; (2) the "innocent construction" rule provides a non-defamatory meaning; (3) statements are non-defamatory opinions; (4) the statements are truthful; (5) Movant provides misstated or misleading postings; and/or (6) the statement is not properly of record in the Complaint. In order to dissuade the Court from being misled that

[60] *See* Bodybuilding.com Ex. "A-2" ("SI03 Board Rep" posting) (emphasis added).

[61] *Doe v. 2 The Mart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

[62] Movant's cause of action for defamation *per se* will still fail against these six (6) pseudonyms on account of all statements are either not "of and concerning" Movant, or the "innocent construction" rule makes it impossible to determine what company is the subject of the speech, or the statements are opinion and therefore not defamatory.

[63] While Bodybuilding.com, LLC has standing (and a self-imposed duty) to defend the First Amendment anonymous speech rights of its members, it challenges the alleged defamatory nature of the pseudonymously posted statements only to the extent that on their face, there clearly exist no grounds for finding any statement cited as defamatory. *See In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000) (AOL standing existed where chat room users expected AOL to protect their anonymity); *NAACP v. Alabama*, 357 U.S. 449 (1958) (substantial nexus exists to allow standing on behalf of members where the consequence to denial of standing is diminished financial support and membership in group). Similarly, Bodybuilding.com, LLC has a legitimate interest in protecting its members anonymity, as disclosure will have catastrophic effects on its reputation in the industry. *See* Bodybuilding.com Ex. "A" (Decl. of Gary Davis).

"defamation" actually occurred, the actual postings from each of the seven (7) remaining pseudonyms are briefly discussed below.

1) **"Aoba"** – Movant alleges defamatory statements including representations that SI03, Inc. used "fake or fraudulent accounts" to "publish false or fraudulent postings" Pl. Mot. to Comp. p.15. This allegation is both misstated and false. Aoba's actual posting of February 18, 2007 references "[s]hills a.k.a syntrax people…."[64] The statement is clearly not "of and concerning" Movant since the statement may be directed to either Syntrax Innovations, Inc. or SI03, Inc., or another, and as such, the "innocent construction" rule requires a non-defamatory meaning be found. *New York Times,* 376 U.S. at 288; *Pope* 95 F.3d at 613. In addition, the Complaint references a statement by "Aoba" that "Andipokinetix (original) caused hepatitis in quite a few people…." Although Movant fails to raise this statement in its Motion to Compel, "Andipokinetix" is not an SI03, Inc. product and thus not "of and concerning" Movant.[65]

2) **"Chimplico"** - The sole allegedly defamatory posting is that a "fatburner from a company who's [sic] last fatburner killed a few people…."[66] The posting does not reference SI03, Inc. or any product it manufactures or distributes, and is thus not "of and concerning" Movant. *New York Times,* 376 U.S. at 288; *Swick,* 62 N.E.2d 1245.

3) **"Cxm"** – Movant references a January 30, 2007 posting that its product has "caused the death of people" as allegedly defamatory. The actual quote refers to a company named

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[64] *See* Pl. Ex. "E3." Movant's Affidavit of Greg Davis (Pl. Ex. "C" ¶¶30-31) states that SI03, Inc. "has no relation in terms of ownership" and "is not the same company as Syntrax Innovations, Inc." Syntrax Innovations, Inc. is a competitor in the same industry and had been linked to prior questionable business practices, including the production of supplements causing to serious health risks and have been the subject of FDA warnings. *See* Bodybuilding.com Ex. "B-1" (Nov. 19, 2001 warning).

[65] *See* Bodybuilding.com Ex. "B-3" (advertisement for Andipokinetix, manufactured by Forge Nutrition). *See also* Pl. Ex. "C" (Affidavit of Greg Davis, ¶¶30-31 stating Forge Nutrition "is not the same company" and "has no relation in terms of ownership" to SI03, Inc.).

[66] *See* Pl. Ex. "E7."

"Syntrax," not SI03, Inc.[67] Movant cannot have it both ways – claiming no relationship to a company responsible for harm to consumers[68] and then claiming defamation when that same company is spoken about unkindly.[69] Movant also alleges defamatory statements of same date referring to Movant as a "shady company." Again, the statement is made about the a company named "Syntrax," not SI03, Inc., and thus not "of and concerning" Movant and even if disputed, as two reasonable constructions of the language exist, the "innocent construction" rule precludes liability. *New York Times,* 376 U.S. at 288; *Pope* 95 F.3d at 613. The additional January 30, 2007 statement "endanger[ing] people's life" also suffers from the same "of and concerning" deficiency as well as would innocent construction lead a reader to believe more than one company could be the target of the statement.

Further, the Motion curiously contains two additional postings not previously referenced in Movant's Complaint: (1) a February 16, 2007 statement regarding "rotten eggs" used by Creative Compounds, L.L.C. in manufacturing a particular supplement and "cxm" incorporates this information into a supplement mixture calculation;[70] and (2) a March 30, 2007 statement that "The Matrix [a possible SI03, Inc. product] has Egg Albumin["]. Movant's own website

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[67] Again, Movant's Affidavit of Greg Davis (Pl. Ex. "C" ¶¶30-31) states that SI03, Inc. "has no relation in terms of ownership" and "is not the same company as Syntrax Innovations, Inc." Supplements from Syntrax Innovations, Inc. have been linked to serious liver injuries and have been the subject of FDA warnings. *See* Bodybuilding.com Ex. "B-1."

[68] *See* Bodybuilding.com Ex. "B-1" (Nov. 19, 2001 warning).

[69] Movant alleges no affiliation between its Syntrax products with competitor Syntrax Innovations, Inc. (whose products are linked to dangerous health risks), yet the similarities are astounding. Movant should not benefit from either (1) adopting a name already implicated in questionable practices or (2) failing to police its trademark and allow others to use same name in a like industry.

[70] *See* Aff. of Greg Davis (Pl. Ex. "C" ¶¶30-31) also referencing no relationship between SI03, Inc. and Creative Compounds, L.L.C. The reference to a seizure by U.S. Customs concerning supplements containing rotten eggs is a true and accurate statement. *See* Bodybuilding.com Ex. "B-4" (seMissourian.com article, dated June 17, 2004, discussing 8,800 pounds of powdered egg white for use in sports nutrition products, condemned by U.S.D.A. on account of it being "prohibited for human consumption.").

references undenatured "egg albumin" as an ingredient in its "Matrix" product.[71] Thus, as the first statement is not "of and concerning" Movant, and the second is a truthful statement about the content of a supplement, neither are capable of defamatory meaning.

Pseudonym "cxm" does speak about "shilling" which although is not defamatory,[72] is irrelevant on account of the statement not clearly being "of and concerning" Movant (may be directed to SI03, Inc. or Syntrax Innovations, Inc. or others), thus allowing for a possible "innocent construction" precluding defamation *per se*.

4) **"El Mariachi"**[73] – The September 23, 2006 statement referring to "Syntrax ... or whatever lame shell company" and it causing "health damaging products" does not identify Movant, but more aptly references a company named "Syntrax." The December 13, 2006 statement refers to "steal[ing] things from other companies" and being labeled "rip-off artists." These statements clearly relate to a company named "Syntrax" (*e.g.* "why would Syntrax ever hire you as a rep") and are not "of and concerning" Movant. The December 9, 2006 statement discusses Syntrax being sued for patent infringement.[74] These statements all suffer from the "of and concerning" deficiency and also fall within the "innocent construction" rule whereby it

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[71] *See* Bodybuilding.com Ex. "B-5" (SI03, Inc. website advertisement for Matrix). However, other websites list Syntrax Matrix as a product distributed by Syntrax Innovations. *See* Bodybuilding.com Ex. "B-7."

[72] The Oxford English Dictionary defines the term "shill" as "a decoy or accomplice, esp. one posing as an enthusiastic or successful customer to encourage other buyers, gamblers, etc." OXFORD ENGLISH DICTIONARY vol. XV 263 (2d ed. 2001). Labeling someone a shill is neither defamatory nor trade libel. In fact, the use of shills is a popular and often successful marketing approach.

[73] Movant's Complaint references only the February 10, 2007 statements as defamatory.

[74] *See Molecular Nutrition, LLC et al v. Syntrax Innovations, Inc. et al.*, No. 1:06-cv-00013-HEA, U.S.D.Ct. E.D.Mo., filed Jan. 24, 2006 (both SI03, Inc. and Syntrax Innovations Inc. are named defendants in a patent infringement suit). Thus the statement is true, but not clear as to whether it is "of and concerning" Movant.

cannot be determined if the statement refers to one or more companies and thus cannot be found defamatory *per se*. *New York Times,* 376 U.S. at 288; *Pope* 95 F.3d at 613.

The February 10, 2007 statement regarding a "shoddy track record" is in response to a posting that "SI03, Inc. owns Syntrax and the name... there is no affiliation with things of the past" and is evidence of a dispute as to what company the posting is actually about. Additional statements of same day regarding the "last fat burner making people sick," likewise discusses Syntrax – the company. Again, as none of these statements specifically identify Movant (and likely apply to an unrelated third party), none are defamatory or disparaging to Movant. *New York Times,* 376 U.S. at 288; *Pope* 95 F.3d at 613.

5) "**Emisgod**"[75] - Movant falsely alleges that the February 17, 2007 statement accuses SI03, Inc. of inaccurately labeling its product. The posting neither asserts that SI03, Inc. mislabeled anything, nor even mentions SI03, Inc. The only reference is to a product ("Nectar")[76] purportedly manufactured by Movant where the statement is a dispute as to whether the product is "the best quality overall."[77] This statement is both not "of and concerning" Movant and is simply an opinion and not defamatory. *Action Repair, Inc.*, 776 F.2d at 147.

6) "**Flagg3**"[78] – Movant claims the statement "Syntrax continues to use dozens of fake IDs and paid pimps to hype their products with false praise" is defamatory. That statement and one regarding "rip-off unsuspecting customers" do not specifically identify SI03, Inc. but applies

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[75] No reference to any specific "defamatory" statement is raised anywhere in Movant's Complaint.

[76] *See* Bodybuilding.com Ex. "B-6" (Internet advertisement from www.vitaminshoppe.com for Syntrax Innovations Nectar).

[77] *See* Pl. Mot. to Compel, Ex. "13."

[78] Movant's Complaint references postings of July 13, 2006 and October 14, 2006 as defamatory, yet the Motion to Compel filed October 22, 2007 references only a third November 14, 2006 posting, never previously presented to Bodybuilding.com, LLC as evidence of defamation.

to "all of these companies" (referencing USPLabs, Avant Labs, Thermolife, Protein Factory and Syntrax).[79] In fact, SI03, Inc. is not even mentioned in the posting, thereby precluding any possible defamation *per se* claim. *Muzikowski*, 477 F. 3d at 904-05.

7) **"Seth25"**[80]- the "defamatory" allegations against this pseudonym is a reference to "Syntrax" using "shills" and a unspecific statement that "again trying to deceive the customer", without any reference to SI03, Inc. Regardless, on account of there existing multiple companies of whom "Seth25" may have been referring, one cannot determine if it is "of and concerning" Movant as well as will the "innocent construction" rule precludes a finding of defamation *per se*. *New York Times,* 376 U.S. at 288; *Pope* 95 F.3d at 613.

Nevertheless, none of the statements posted by the seven (7) pseudonyms above constitute defamation, trade libel or commercial disparagement. Thus, absent Movant's ability to 1) show a *prima facie* cause of action or 2) present claims which would meet a summary judgment standard, disclosing the identity of the pseudonymous internet speakers is an unwarranted and inappropriate encroachment upon the First Amendment right to anonymous speech.

VI. CONCLUSION

For the reasons set forth above, the Motion should be denied.

COSHO HUMPHREY, LLP

DATED: November 16, 2007.

By: /s/ Thomas G. Walker
THOMAS G. WALKER
Attorneys for BODYBUILDING.COM

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[79] *See Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 561 (N.D. Ill. 1987) (without specificity as to group member actually defamed, article directed to group not sufficient to maintain cause of action for defamation).

[80] Movant's Complaint never even mentions this pseudonym as making a defamatory statement. Only in the Motion to Compel is an allegation raised.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing on the individuals listed below through electronic notification to those parties registered with the U.S. Court's CM/ECF System on the 16th day of November, 2007, and by United States Mail, first class postage prepaid thereon and addressed to:

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