

713 F.Supp.2d 901

(Cite as: 713 F.Supp.2d 901)

United States District Court,
N.D. California.
USA TECHNOLOGIES, INC., Plaintiff,

v.

John DOE, a.k.a. "Stokklerk," et al., Defendants.

No. C 09-80275 SI.

May 17, 2010.

Background: Publicly traded Pennsylvania corporation brought action alleging violation of the Securities Exchange Act and Pennsylvania common law defamation and obtained subpoena directing Internet service that hosted web pages providing stock quotes and message boards to provide IP address of pseudonymous poster of unflattering messages about the corporation. The poster moved to quash.

Holdings: The District Court, Susan Illston, J., held that:

- (1) motion to quash subpoena issued from the Northern District of California was properly before California court although suit had been filed in the Eastern District of Pennsylvania;
- (2) corporation did not make out a prima facie case of section 10(b) or Rule 10b-5 securities violation;
- (3) corporation was not entitled to discovery regarding identity of alleged message poster unless corporation pled prima facie case that poster had acted unlawfully; and
- (4) under Pennsylvania law, the posted messages were not defamatory as a matter of law.

Motion granted.

West Headnotes

[1] Witnesses 410 🔑16

410 Witnesses

410I In General

410k16 k. Subpoena duces tecum. Most Cited Cases

Motion to quash subpoena duces tecum issued from the Northern District of California directing Internet service to produce IP address of pseudonymous poster of unflattering messages about corporation was properly before the United States District Court for the Northern District of California, although corporation had filed complaint alleging securities violation and defamation claim in the Eastern District of Pennsylvania and judge in that district had granted motion to issue subpoena. Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A.

[2] Constitutional Law 92 🔑1581

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1581 k. Anonymous speech. Most Cited Cases

The First Amendment protects the rights of individuals to speak anonymously. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 🔑2149

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2148 Internet

92k2149 k. In general. Most Cited Cases

First Amendment right to speak anonymously extends to speech via the Internet. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 🔑1545

92 Constitutional Law

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92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1545 k. In general. Most Cited

Cases

Constitutional Law 92 ↪2161

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2161 k. In general. Most Cited

Cases

Constitution does not protect tortious, defamatory, or libelous speech. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ↪2088

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(V) Judicial Proceedings

92XVIII(V)1 In General

92k2088 k. Discovery and subpoenas.

Most Cited Cases

Constitutional Law 92 ↪2149

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2148 Internet

92k2149 k. In general. Most Cited

Cases

In order to protect anonymous speech consistent with the First Amendment, efforts to use the power of the courts to discover the identities of anonymous speakers are subject to a qualified privilege that recognizes the Constitutional protection

afforded pseudonymous speech over the internet and the chilling effect that subpoenas would have on lawful commentary and protest. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ↪2149

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2148 Internet

92k2149 k. In general. Most Cited

Cases

The application of procedures and standards for compelling the identification of anonymous online speakers consistent with the First Amendment must be undertaken and analyzed on a case-by-case basis, with the guiding principle being a result based on a meaningful analysis and a proper balancing of the equities and rights at issue. U.S.C.A. Const.Amend. 1.

[7] Securities Regulation 349B ↪60.34

349B Securities Regulation

349BI Federal Regulation

349BI(C) Trading and Markets

349BI(C)7 Fraud and Manipulation

349Bk60.34 k. Existence of private cause of action. Most Cited Cases

Section 10(b) and Rule 10b-5 provide a private cause of action for fraudulent conduct related to the purchase or sale of securities. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[8] Securities Regulation 349B ↪60.18

349B Securities Regulation

349BI Federal Regulation

349BI(C) Trading and Markets

349BI(C)7 Fraud and Manipulation

349Bk60.17 Manipulative, Deceptive

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or Fraudulent Conduct

349Bk60.18 k. In general. Most Cited Cases

To establish liability under section 10(b) and Rule 10b-5, a plaintiff is required to prove that in connection with the purchase or sale of a security the defendant, acting with scienter, made a material misrepresentation, or a material omission if the defendant had a duty to speak, or used a fraudulent device. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[9] Securities Regulation 349B ⚡60.15

349B Securities Regulation

349BI Federal Regulation

349BI(C) Trading and Markets

349BI(C)7 Fraud and Manipulation

349Bk60.11 Transactions Subject to Regulation

349Bk60.15 k. Connection with purchase or sale. Most Cited Cases

Securities Regulation 349B ⚡60.25

349B Securities Regulation

349BI Federal Regulation

349BI(C) Trading and Markets

349BI(C)7 Fraud and Manipulation

349Bk60.17 Manipulative, Deceptive or Fraudulent Conduct

349Bk60.25 k. Fraud on the market; price manipulation. Most Cited Cases

Publicly traded corporation did not make out a prima facie case of section 10(b) or Rule 10b-5 securities violation against alleged poster of unflattering messages about corporation on Internet, where corporation did not allege poster ever owned or sold any of corporation's stock and did not submit competent evidence that alleged statements distorted market price for corporate stock and damaged corporation as a result. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[10] Federal Civil Procedure 170A ⚡1269.1

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1269 Grounds and Objections

170Ak1269.1 k. In general. Most Cited Cases

Publicly traded corporation that brought action under section 10(b) and Rule 10b-5 against poster of unflattering messages about corporation on Internet was not entitled to discovery regarding identity of alleged poster of messages unless corporation pled prima facie case that poster had acted unlawfully, despite corporation's claim it could not ascertain facts supporting claim without discovery; corporation should have been able to identify effect on stock price caused by the messages. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[11] Witnesses 410 ⚡16

410 Witnesses

410I In General

410k16 k. Subpoena duces tecum. Most Cited Cases

Although ultimate question of federal jurisdiction would be decided by the United States District Court for the Eastern District of Pennsylvania, where suit had been filed, the apparent deficiency of claim which provided sole basis for federal jurisdiction was appropriate basis to grant motion to quash subpoena issued in the Northern District of California in aid of discovery of identity of defendant who had posted Internet messages pseudonymously.

[12] Libel and Slander 237 ⚡6(1)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(1) k. In general. Most Cited Cases

Courts in Pennsylvania recognize a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse, and under Pennsylvania law, statements which are merely annoying or embarrassing or no more than rhetorical hyperbole or vigorous epithet are not defamatory.

[13] Libel and Slander 237 ¶10(5)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k10 Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment

237k10(5) k. Corporation and association officers. Most Cited Cases

Under Pennsylvania law, pseudonymous Internet postings alleging that publicly traded corporation's chief executive officer fleeced humanity and that corporation's poor performance and executive compensation practices amounted to legalized highway robbery were insult and rhetorical hyperbole that were not provably false and were not defamatory as a matter of law.

[14] Libel and Slander 237 ¶6(2)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(2) k. Imputation of falsehood, dishonesty, or fraud. Most Cited Cases

Libel and Slander 237 ¶10(5)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k10 Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment

237k10(5) k. Corporation and association officers. Most Cited Cases

Under Pennsylvania law, pseudonymous Internet posting alleging publicly traded corporation's chief executive officer (CEO) was a known liar was not defamatory when read in context with next part of post that CEO assured investors corporation would be profitable in the same fiscal year when it was not; poster's hyperbolic opinion of CEO's inaccurate prediction was not defamatory, and poster did not opine CEO was liar based on undisclosed facts, but explained basis for his opinion.

[15] Libel and Slander 237 ¶6(1)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(1) k. In general. Most Cited Cases

Under Pennsylvania law, pseudonymous Internet posting alleging publicly traded corporation was a "soft Ponzi" was not defamatory as matter of law; the term had no widely-recognized defamatory meaning, corporation presented no evidence suggesting readers inferred meaning except from poster's message board statements and understood phrase to mean Ponzi scheme, and poster defined term to criticize the way he believed corporation was being run while admitting corporation's conduct was legal.

[16] Libel and Slander 237 ¶7(12)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k7 Words Imputing Crime and Immorality

237k7(12) k. Forgery, false pretenses, and breach of trust. Most Cited Cases

Libel and Slander 237 ¶10(5)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k10 Words Imputing Unfitness for or

Misconduct or Criminal Acts in Office or Employment

237k10(5) k. Corporation and association officers. Most Cited Cases

Under Pennsylvania law, pseudonymous Internet posting accusing officers of publicly traded corporation of embezzling by skimming millions of dollars from hugely unprofitable venture was not defamatory as matter of law when read in context of next sentence stating the officers were paid through board-approved massive pay packages; hyperbolic criticisms of how corporation was being run were protected opinion, and corporation presented no evidence that any reasonable reader understood message to mean officers had embezzled.

*904 Alex Paul Catalona, Schiff Hardin LLP, San Francisco, CA, for Plaintiff.

Matthew Zimmerman, Electronic Frontier Foundation, David M. Given, Nicholas A. Carlin, Phillips & Erlewine & Given LLP, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO QUASH

SUSAN ILLSTON, District Judge.

Before the Court is a motion by John Doe, a.k.a. "Stokklerk," to quash the subpoena of USA Technologies, Inc. This motion derives from an action filed in the Eastern District of Pennsylvania alleging violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and Pennsylvania common law defamation. USA Technologies, Inc. asserts that the Eastern District of Pennsylvania has federal question jurisdiction under 28 U.S.C.A. § 1331 over its securities claim and supplemental jurisdiction under 28 U.S.C.A. § 1367 over its common law defamation claim. Compl. ¶ 7–8. After consideration of the parties' papers, relevant legal authority, and good cause appearing, the Court hereby GRANTS defendant's motion to quash.

BACKGROUND

1. Factual background

USA Technologies, Inc. ("USAT"), a publicly traded Pennsylvania corporation located in Malvern, PA, provides "cashless, micro-transactions, and networking services." Compl. ¶ 3. Yahoo! operates a website which provides, among many other things, online informational web pages about publicly traded companies. Compl. ¶ 4. Yahoo! hosts web pages for publicly traded companies providing stock quotes and a message board on which individuals may pseudonymously post messages concerning the company or its stock. Compl. ¶ 4; *see e.g.* Yahoo!'s USAT message board, <http://messages.finance.yahoo.com/mb/USAT>.

Between April 15, 2009 and August 24, 2009, defendant, an unidentified individual using the pseudonym "Stokklerk," submitted unflattering messages to Yahoo!'s USAT message board concerning USAT's officers, stock performance, and operations. Compl. ¶ 6. USAT cannot ascertain the identity of defendant due to his use of a pseudonym and has therefore subpoenaed Yahoo! for defendant's IP address. Motion to Quash ("Motion") at 2:10–18; Zimmerman Decl., Ex. B.

2. Procedural background

[1] On August 27, 2009, USAT filed a complaint in the Eastern District of Pennsylvania alleging violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. ("securities claim"), and Pennsylvania common law defamation. Compl. ¶¶ 7–8. Soon after filing its complaint, USAT filed a Motion for Issuance of Subpoenas Duces Tecum direct to Yahoo! Inc. ("Yahoo!") for the production of defendant's IP address, so that USAT could obtain defendant's identity. On September 10, 2009, Judge Jan Dubois of the Eastern District of Pennsylvania granted the motion, without *905 prejudice to defendant's right to file a timely motion to quash. On September 24, 2009 a subpoena issued from the Northern District of California, directing Yahoo! to produce defendant's IP address. Responding to this subpoena, Yahoo! notified defendant that it would release his ^{FN1} IP address unless

he filed a motion to quash the subpoena in the Northern District of California within fifteen days. Motion at 2:19–21. This motion to quash is properly before the Court pursuant to Fed.R.Civ.P. 45(c) because the subpoena in question was issued to Yahoo! by the Northern District of California.

FN1. The Court will refer to defendant as a “he” for convenience and to remain consistent with the parties’ briefs.

3. Allegedly defamatory statements made by defendant

USAT bases its complaint on three discrete statements and one recurring statement made by “Stokklerk” on Yahoo!’s USAT message board. In its Opposition brief and in oral argument, USAT also raised issue with another statement that was not mentioned in the complaint. The allegedly defamatory messages are as follows:

1. A message posted by defendant on August 6, 2009 at 2:02 p.m. allegedly accused USAT’s Chief Executive Officer George R. Jensen of “fleecing humanity.” Compl. ¶ 10(a). Defendant Stokklerk’s actual statement read: “Penultimately, as regards sleeping at night: Jensen has no trouble sleeping. He’s a caricature of any number of characters in Dickens or Shakespeare whose worldview is that humanity exists to be fleeced. They sleep well, that type.” Plaintiff’s Opposition to Defendants Motion to Quash (“Opp.”) at 6:26–7:1.

2. A message posted by defendant on August 4, 2009 at 8:29 p.m. allegedly accused Jensen of being a “known liar.” Compl. ¶ 10(b). Motion pg. 8. Stokklerk’s full statement read:

The NASDAQ Small and Micro Cap exchanges are lousy with scam companies that, if they were limited partnerships, would have closed their doors in short order. USAT is a failure. It always was; it always will be. Jensen is a known liar. Several years ago (my memory fails; approx 2005–06; perhaps someone can nail down the exact year), he assured investors that USAT would

be profitable in the same fiscal year. The company didn’t even come close. No apologies, no explanations, no nothing. Just more spin.

Opp. at 5:2–7.

3. A message posted by defendant on August 16, 2009 at 11:29 p.m. allegedly accused USAT of “legalized highway robbery.” Compl. ¶ 10(c). Stokklerk’s full statement read:

If you’ll permit me ...

Re USAT: “This is legalized highway robbery.”

I think that’s the very definition of a so-called soft Ponzi, vs. a shall we say hard Ponzi, which is, by definition illegal. I don’t recall where I got the definition. A scholar of economics. Rubini, maybe. No matter. It seems to fit.

I think we’re on the same page, different paragraph.

Opp. at 8:4–9.

4. Multiple messages posted by defendant allegedly accused USAT of being a “Ponzi scheme.” Compl. ¶ 10(d). Most of these twenty-three statements were in the form of a question repeated in the message footer that stated: “USAT: soft Ponzi?” Motion at 9:14–18; Opp. at 3–11. On three instances, defendant described what *906 was meant by the term “soft Ponzi.” First, on August 16, 2009, defendant defined the term in reference to the “legalized highway robbery” comment discussed above. Second, on August 18, 2009 he posted: “By golly, I think that I’ve inadvertently mentioned three characteristics of a soft Ponzi scheme: out-sized payments in the form of executive compensation in a failing enterprise; interesting schemes to take in new money; the notion that success is just over the horizon. USAT: soft Ponzi?” Opp. at 9:9–13. Third, on July 21, 2009, he posted:

Not 1 penny profit in this fugly company’s sad

history, yet millions have been paid in bonuses and director's fees."

USAT: soft Ponzi?

A strong argument can be made that it's the very definition.

If it's proof you desire, ask the less-than-theoretical question, Could this company have survived as long as it has if it had been privately held? Answer: not a chance. Private equity demands performance. The doors would have closed years ago.

Opp. at 4.

5. Though not mentioned in the complaint, US-AT argues it was also defamed by a message posted by defendant on August 3, 2009 at 1:38 p.m. that allegedly accused the "two top people at USAT" of "skimming." Opp. at 4, 17. Defendant Stokklerk's statement read:

The two top people at USAT have skimmed over \$30M from the hugely unprofitable venture. Management, with little to nothing at risk, promotes a "story" to lure investors and then the board approves massive pay packages which are in no way tied to company performance."

Definition of "soft Ponzi"?

Opp. at 4.

LEGAL STANDARD

[2][3][4] The First Amendment protects the rights of individuals to speak anonymously. *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 166–67, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). "The right to speak anonymously extends to speech via the Internet." See, e.g., *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092–93 (W.D.Wash.2001) ("Internet anonymity facilitates the rich, diverse, and far ranging

exchange of ideas."); see generally *Reno v. ACLU*, 521 U.S. 844, 853, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573, 578 (N.D.Cal.1999). The Constitution does not, however, protect tortious, defamatory, or libelous speech. *Doe v. Cahill*, 884 A.2d 451, 456 (Del.2005) (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)).

[5][6] In order to protect anonymous speech, efforts to use the power of the courts to discover the identities of anonymous speakers are subject to a qualified privilege. This privilege recognizes the Constitutional protection afforded pseudonymous speech over the internet, and the chilling effect that subpoenas would have on lawful commentary and protest. See *907 *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969, 974–76 (N.D.Cal.2005). The application of procedures and standards for compelling the identification of anonymous online speakers "must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l v. Doe No. 3*, 342 N.J.Super. 134, 775 A.2d 756, 761 (N.J.App.2001) (adopting a four-part test).

In *Highfields Capital Mgmt. v. Doe*, *supra*, this Court adopted a streamlined version of the *Dendrite* test that requires: (1) the plaintiff to adduce, without the aid of discovery, *competent evidence* addressing all of the inferences of fact essential to support a *prima facie* case on all elements of a claim; and (2) if the plaintiff succeeds, the court

must:

assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant. If, after such an assessment, the court concludes that enforcing the subpoena would cause relatively little harm to the defendant's First Amendment and privacy rights and that its issuance is necessary to enable plaintiff to protect against or remedy serious wrongs, the court would deny the motion to quash.

Highfields, 385 F.Supp.2d at 975–76.

DISCUSSION

1. USAT's securities claim

[7][8][9] As to the first *Highfields* requirement, USAT has failed to plead, much less adduce competent evidence to support, a prima facie case for violation of Section 10(b) and Rule 10b–5. Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”, 15 U.S.C. § 78j(b)), and Rule 10b–5 (17 C.F.R. § 240.10b–5), provide a private cause of action for fraudulent conduct related to the purchase or sale of securities. In order to establish liability under these sections, “a plaintiff is required to prove that in connection with the purchase or sale of a security the defendant, acting with scienter, made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device.” *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1467 (2d Cir.1996) (internal citations and quotations omitted). USAT has failed to make out a prima facie case in support of its securities claim because it does not allege any facts that defendant ever owned or sold any USAT stock or submit competent evidence that Stokklerk's alleged statements distorted the market price for USAT stock, and that USAT was damaged as a result.^{FN2}

FN2. See, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (to plead a violation of § 10(b) and SEC Rule 10b–5,

a plaintiff must allege that (1) defendants made a material misrepresentation or omission; (2) the misrepresentation was in connection with the purchase or sale of a security; (3) the misrepresentation caused plaintiff's loss; (4) plaintiff relied on the misrepresentation or omission; (5) defendants acted with scienter; and (6) plaintiff suffered damages. Each of these elements must be pleaded as to each defendant).

[10][11] USAT tacitly admits as much in its opposition brief by failing to address the securities claim, despite defendant's identification of deficiencies in that claim. See *Opp.* at 19 n. 22 (“USAT does not address [its securities claim] here because it has established an actionable defamation claim under Pennsylvania law, which by itself must defeat Stokklerk's motion.”). At the hearing on this motion, USAT suggested that it cannot ascertain supporting facts for this claim unless this motion is denied and discovery is allowed. However, *Highfields* makes clear that USAT is *908 not entitled to discovery unless it can plead a prima facie case that defendant has acted unlawfully. *Highfields*, 385 F.Supp.2d at 975–76. Further, this argument does not explain USAT's failure to identify an effect on its stock price caused by the defendant's statements. No additional discovery from defendant should be necessary to identify a correlation of this kind. Though the ultimate question of federal jurisdiction will be decided by the Eastern District of Pennsylvania, the apparent deficiency of the claim, which is the sole basis for federal jurisdiction in this case, is an appropriate basis to grant the Motion to Quash. See, e.g., *Sinclair v. TubeSockTedD*, 596 F.Supp.2d 128, 134 (D.D.C.2009) (refusing to enforce a subpoena seeking disclosure of the identity of an anonymous internet commentator, in part, because the court lacked subject-matter jurisdiction over the complaint); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988) (“if a district court does not have subject-matter jurisdiction over the underlying action, and the process

was not issued in aid of determining that jurisdiction, then the process is void”).

2. USAT's defamation claim

Even if plaintiffs could cure the deficiencies in their securities claim by amendment—which they would have to undertake in the Eastern District of Pennsylvania—the Court also finds that USAT cannot demonstrate a prima facie case of defamation under Pennsylvania law because the statements complained of are not defamatory as a matter of law.

[12] Courts in Pennsylvania recognize a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse. *Beverly v. Trump*, 182 F.3d 183, 187–88 (3rd Cir.1999). “[S]tatements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are not defamatory.” *Id.* (quoting *Kryeski v. Schott Glass Techn., Inc.*, 426 Pa.Super. 105, 626 A.2d 595, 601 (1993)). In *Beverly*, the Third Circuit held that it was “reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing” when defendant exclaimed at a rally: “you people at [company] are all criminals.” *Beverly v. Trump*, 182 F.3d 183, 187–88 (3rd Cir.1999).

[13] Similarly, in this action the first complained-of statement asserts: “[Jensen is] a caricature of any number of characters in Dickens or Shakespeare whose worldview is that humanity exists to be fleeced.” Although this statement may be seen as offensive, the law of defamation does not extend to mere insult. *Beverly*, 182 F.3d at 187–88. As the colorful language indicates, this statement constitutes “rhetorical hyperbole,” and not a statement of fact that can be verified or disproved. Similarly, the statement that USAT's poor performance and executive compensation practices amount to “legalized highway robbery” is not capable of defamatory meaning because it is rhetorical hyperbole and not provably false. *Id.*, at 187–88.

[14] The statement that Jensen is a “known li-

ar,” is not defamatory when read in context with the next part of the post: because Jensen “assured investors that USAT would be profitable in the same fiscal year,” when it wasn't. Defendant's hyperbolic opinion of Jensen's inaccurate prediction is not defamatory. *See, e.g., Global Telemedia Int'l, Inc. v. Doe I*, 132 F.Supp.2d 1261, 1270 (C.D.Cal.2001) (“while [the statements] are not positive, the statement [that plaintiff lied] contains exaggerated speech and broad generalities, all indicia of opinion. Given the tone, a reasonable reader would not think the *909 poster was stating facts about the company, but rather expressing displeasure with the way the company is run”). Also, here, Stokklerk did not opine that Jensen is a liar based on some other, undisclosed facts, but instead explained the basis for his opinion. *Cf., id.* at 1268 (where poster identified document supporting poster's view that plaintiff, “misrepresented” and “overstated” facts, statements were opinion).^{FN3}

FN3. Plaintiffs also fail to allege or submit competent evidence that these disclosed facts are incorrect or incomplete or otherwise erroneous. *Cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

[15] Defendant's statements regarding whether USAT is a “soft Ponzi” presents a slightly different question. The term “soft Ponzi” has no widely-recognized defamatory meaning and USAT has presented no evidence suggesting that readers had any clue to its meaning except from defendant's statements on the message board. *See, e.g., Thomas Merton Center v. Rockwell International Corp.*, 497 Pa. 460, 442 A.2d 213, 215–16 (1981) (if statements are not “capable of a defamatory meaning” there is no liability). As noted above, *supra* at 905–06, Stokklerk actually defined his “soft Ponzi” term three times in his posts, in order to criticize the way he believed USAT was being run while admitting the conduct was legal. USAT also suggests that readers would have misunderstood this phrase to mean that USAT was operating as a traditional

“Ponzi scheme.” However, USAT has presented no competent evidence that readers of defendant's posts understood the phrase “soft Ponzi” to mean “Ponzi scheme” as defined by plaintiffs. Opp. at 2–3.

[16] Finally, USAT contends that defendant accused its officers of “embezzling” by stating “the two top people at USAT have skimmed over \$30M from the hugely unprofitable venture.” However, defendant in his next sentence states that these officers were paid through “board [approved] massive pay packages.” Again, read in context, Stokklerk's hyperbolic criticisms of the way USAT was being run are protected opinion. USAT has provided no evidence in its complaint, briefs, or at the motion hearing that any reasonable reader understood the “skimming” based upon allegedly “massive pay packages” message to mean that USAT's top two officers had “embezzled.” *Cf., Remick v. Manfredy*, 238 F.3d 248, 262–63 (3d Cir.Pa.2001) (use of “extort,” in context, constituted rhetorical hyperbole); *see also Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (finding “blackmail” accusation not defamatory because no reader could have thought that plaintiff was being charged “with the commission of a criminal offense”).

Accordingly, plaintiffs have failed to plead, much less produce competent evidence to establish, a prime a facie case of defamation against Stokklerk.^{FN4}

FN4. As the Court finds that plaintiffs have failed to plead or submit competent evidence to support a prima face case against defendant, the Court need not reach the second prong of the *Highfields* case, 385 F.Supp.2d at 975–76, requiring a balancing of the harms caused to the competing interests from compelled disclosure of an anonymous poster's identity.

CONCLUSION

For the foregoing reasons and for good cause

shown, the Court hereby GRANTS defendant's motion to quash.

IT IS SO ORDERED.

N.D.Cal.,2010.

USA Technologies, Inc. v. Doe
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