

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

EAST COAST TEST PREP LLC d/b/a)	Case No. 15-cv-03705 JRT-JSM
Achieve Test Prep, and MARK)	
OLYNYK,)	
)	
Plaintiffs,)	
v.)	MEMORANDUM OPINION
)	AND ORDER
ALLNURSES.COM, INC., DAVID R.)	
SMITS, <i>as Administrator of the Estate</i>)	
<i>of Brian Short</i> , ABC COMPANIES 1-10)	
and JOHN DOES 1-10,)	
)	
Defendants.)	

On May 19, 2016, this Court issued an Order setting forth the procedure to resolve plaintiffs' First Amendment-related discovery directed to defendants to discover the identity of the John Does, and as addressed by a motion previously filed by plaintiffs to compel discovery [Docket No. 56] and the Order Vacating the Order of Magistrate Judge Dated December 18, 2015 and Denying Plaintiffs' Discovery Motion ("Vacation Order") [Docket No. 129]. See East Coast Test Prep LLC v. Allnurses.com, Inc., No. CV 15-3705 (JRT/JSM), 2016 WL 912192, at *1 (D. Minn. Mar. 7, 2016).

The background to the May 19, 2016 Order, is set forth in the Vacation Order:

Plaintiffs are East Coast Test Prep, which does business as Achieve Test Prep, and the company's owner Mark Olynyk (together "ATP"). ATP filed this action naming as defendants Allnurses.com, Inc., the estate of Allnurses' founder, and a number of yet-to-be-named companies and "John Doe" individuals (together "Allnurses").

ATP's business is to prepare nurses for nursing-related exams. ATP alleges in its complaint that Allnurses is liable

for defamatory statements made by pseudonymous users – the John Does named as defendants in this case – in posts on the Allnurses website. This case is now in the discovery stage.

In October 2015, ATP filed a motion to require Allnurses to produce:

1. Any and all documents containing the true name of each Poster.
2. Any and all documents containing the postal or physical address of each Poster.
3. Any and all documents that contain identification information of any and all of the Posters, including information as to true name, location (including without limitation, residence, work or employer, contact information (including without limitation, address, phone, fax, email).
4. Any and all IP Address Logs for each and every Poster pertaining to each and every session that said Poster accessed, created, deleted, edited, modified, copied, pasted, uploaded, downloaded, sent, received, transmitted or communicated on or pertaining to Allnurses.com

(Mem. in Supp. of Pl.’s Mot to Compel, Ex. A (“Req. for Produc.”) at 7, Oct. 23, 2015, Docket No. 57.)

United States Magistrate Judge Jan[i]e Mayeron granted the motion on December 18 and issued a written order finding that Allnurses did not have third-party standing to assert the First Amendment interests of the pseudonymous posters because “there are no practical obstacles to the John Does asserting their own rights.” (Order at 28, Dec. 18, 2015, Docket No. 85.) The Magistrate Judge’s order also found that ATP was only seeking the internet protocol (“IP”) addresses for the posters and therefore the motion did not implicate the posters’ right to speak anonymously, suggesting that even if Allnurses had standing to represent the John Does’ interests, no First Amendment interests were implicated. (*Id.* at 22.) Allnurses timely objected to the Magistrate Judge’s order, arguing these findings were clearly

erroneous or contrary to law. (Defs.' Obj., Jan. 4, 2016, Docket No. 87.)

Id.

The District Court reversed this Court's Order granting the motion to compel, concluding that Allnurses had third-party standing to assert the First Amendment interests of the John Does; the John Does' First Amendment interests were implicated by plaintiffs' discovery requests; and therefore, certain precautions had to be taken "before issuing discovery orders that may unmask an anonymous speaker." Id., at *3-5. Regarding the precautions that needed to be put in place, the District Court explained:

First, the party seeking discovery of the information that might unmask the anonymous speaker must make reasonable efforts to notify the speaker by, for example, attempting notice via the same medium used by the speaker to send or post the at-issue message. Doe I v. Individuals, 561 F.Supp.2d 249, 254 (D.Conn. 2008); Dendrite [Int'l, Inc. v. John Doe No. 3], 775 A.2d 756, 760 (2001)]; see also [Nathaniel] Gleicher, [John Doe Subpoenas: Toward a Consistent Legal Standard, 118 Y.L.J. 320, 363 (2008)]. This requirement gives the speaker the opportunity to seek to quash the discovery request on their own. Doe I v. Individuals, 561 F.Supp. at 254. Second, the plaintiff must produce prima facie support for all of the elements of his or her case that are within his or her control. Arista Records, [LLC v. Doe 3], 604 F.3d 110, 119 (2d Cir.2010)]; Doe I v. Individuals, 561 F.Supp.2d at 255–56; Highfields Capital Mgmt. L.P. v. Doe, 385 F.Supp.2d 969, 976 (N.D. Cal. 2005). "Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." Krinsky v. Doe 6, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, 245 (Ct. App. 2008). Third, the Court must consider whether the plaintiff has identified specific statements made by the anonymous speakers and consider "whether there is an alternative means of obtaining the information." Doe I v. Individuals, 561 F.Supp.2d at 255; see also Dendrite, 775 A.2d at 760. Fourth and finally, if the above factors do not make it abundantly clear, the Court must determine whether the "party seeking discovery has 'demonstrated an interest in obtaining the disclosures it

seeks ... which is sufficient to justify the deterrent effect ... on the free exercise ... of [the] constitutionally protected right.’ ” Perry v. Schwarzenegger, 591 F.3d 1147, 1164 (9th Cir. 2009) (alterations in original) (quoting NAACP v. Alabama, 357 U.S. 449, 463, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)); see also Dendrite, 775 A.2d at 760–61; Gleicher, 118 Y.L.J. at 363.

Here, ATP has not yet met the first requirement of this test. None of the papers before the Court indicate that ATP attempted to provide the John Doe defendants with notice of ATP's discovery request.¹ The Court therefore finds that plaintiffs have not yet met their burden in ensuring that the requested discovery order would not abridge the freedom of speech. The Court will deny ATP's motion, and invite ATP to file a subsequent motion—if the company wishes—to attempt compliance with above-stated law.

Id., at *5. In footnote 1, the District Court stated: “ATP takes care to note that Allnurses has not attempted notice—but the cases do not require Allnurses to do so.” Id.

Following the issuance of the Vacation Order, this Court worked with counsel for the parties to develop a procedure for plaintiffs to renew their motion to compel Allnurses to answer discovery that would disclose the identities of the John Does, after notification of the motion to the John Does. In this regard, the Court issued an Order requiring:

3. The parties shall attempt to agree on “Content and Modality of Notice” (defined as content, composition, color form, format, manner, placement, mode, method, hyperlinks, functionality of hyperlinks, including without limitation, hyperlinks to documents, and proofs of the foregoing (as applicable) by May 23, 2016. If counsel cannot agree to the Content and Modality of Notice, the matter shall be submitted to the Court in writing [via a letter brief not to exceed three single-spaced pages] for consideration at a telephonic or in person hearing, on the record.

8. The Notice shall: (a) inform the John Does that they may oppose the motion by filing with the court and serving on all counsel of the parties opposition papers on a date certain (3 weeks after the Notice is posted) and; (b) shall inform the John Does of the date, time, and location of the motion to compel hearing.
9. Four weeks after the Notice is given to the John Does, defendants shall file and serve their response to plaintiffs' Motion. As part of their response, defendants may address any responses filed by any John Doe.
10. Within two weeks after the filing and service of defendants' responsive papers, plaintiffs' may file and serve their reply. As part of their reply, plaintiffs may address any responses filed by any John Doe.
11. The hearing date shall be no sooner than two weeks after the filing and service of any reply by plaintiffs or four weeks after the filing and service of defendants' response. The Court will set the hearing date before the Notice is posted.

Order dated May 19, 2016 ("1st Amend. Motion Proc. Order") [Docket No. 144].

The parties conferred on the "Content and Modality of Notice," reached agreement on some issues and not on other issues. Therefore, following written submission of the disputed issues to the Court, a hearing was held. The three issues presented by the parties for resolution by the Court were: (1) the content of the notice to the John Doe defendants that would be placed on Allhurses' website, (2) the "modality" of the notice; and (3) whether the John Does could communicate anonymously or ex parte with the Court. In a later conference with the Court, the parties raised the treatment of the sealed portions of the parties' submissions filed with the Court in connection with plaintiffs' motion to compel (i.e. whether the John Does could have

access to any of the sealed portions when they are not parties to the suit or signatories to the Protective Order governing this case.). This Order addresses all four issues.

1. Content of Notice to John Does

The parties agree that there will be placed on Allnurses' website a "Banner" and a "Legal Notice Page." The Banner will appear on the homepage of Allnurses' website in a form that is accessible by desktop and mobile devices, and will notify the John Doe defendants identified in plaintiffs' motion¹ that an order has issued from this Court that affects them and directs them, via a hyperlink, to the Legal Notice Page. The Legal Notice Page contains information regarding the motion, attaches copies of the relevant pleadings (e.g. Complaint, Vacation Order, plaintiffs' motion to compel and supporting documents, 1st Amend. Motion Proc. Order), and sets forth the procedure for any John Doe to respond to the motion. Plaintiffs and Allnurses submitted to this Court their respective proposed versions for the Banner and Legal Notice Page.

Having considered the versions of the parties, the Court made certain revisions and orders that the Banner and Legal Notice Page conform to the documents attached to this Order at Exhibits A and B. The parties shall now comply with Paragraphs 4 and 5 of the 1st Amend. Motion Proc. Order to develop the final version of the Banner and Legal Notice Page.

¹ To the extent that Allnurses argued that the Banner and Legal Notice should be addressed to all John Does identified in plaintiffs' discovery requests, the Court rejects that contention. The only John Does who are the subject of plaintiffs' motion are Pixie.RN, JustBeachyNurse, monkeyhq, duskyjewel, and LadyFree28. Therefore, they are the only persons to whom the Notice of the motion should be directed.

2. Modality of Communications to the John Does

In addition to posting information about plaintiffs' motion on the Allnurses website via the Banner and Legal Notice Page, plaintiffs sought to have Allnurses send the notice directly to each John Doe via an email and its private messaging system, which allows it to communicate with its subscribers. Allnurses objected to these additional modes of communication, arguing that pursuant to the Vacation Order and the case law cited in the Order, it has no obligation to provide any notice to the John Doe defendants via email or other "active" means, such as their private messaging system. At the hearing, Allnurses' counsel raised other objections to notice by email or its private messaging system, including that Allnurses should not be and was not required to be plaintiffs' agent to provide notice; Allnurses should not be compelled to search for contact information regarding the John Does when the contact information was the very subject of the motion; the adequacy of the search for the contact information should not be an issue in the case (e.g. would it be enough to check the profile of the John Doe or would Allnurses have to search everywhere on its site to discover the contact information?), and as a corollary, Allnurses should not be expected to certify the extent and adequacy of its search nor be subjected to any potential liability to any John Doe who complained that the communication was not adequate; and what responsibility, if any, would Allnurses have if a John Doe communicated with it in response to a message it sent to the John Doe? (e.g. would Allnurses be required to share that communication with the Court or the contact information with the Court?).

In response, plaintiffs' counsel argued that neither the Vacation Order nor the case law prohibited ordering Allnurses from providing notice to the John Does via other

means at their disposal; plaintiffs were not asking Allnurses to search its entire site to discover contact information for each John Doe – they were only requesting that Allnurses communicate with the John Does through the email address maintained in the profile for each John Doe and to send a message via Allnurses' private messaging system, as they would do in the ordinary course of business; Allnurses should only be required to certify that they sent the communication to the emails on record and through the private messaging system; and Allnurses could add a "do not reply" to the email message to prevent any response by a John Doe.

Based on the Vacation Order and the authority cited in the Order (2016 WL 912192, at *5 (citing Doe I v. Individuals, 561 F.Supp.2d at 254; Dendrite, 775 A.2d at 760; Gleicher, 118 Y.L.J. at 363)), the Court finds that plaintiffs' obligation to make reasonable efforts to give notice to the John Does of the motion to compel is satisfied by posting the notice on Allnurses' website as provided by this Order. While it certainly would be desirable if Allnurses would provide additional notice to the John Does via other more focused means (e.g. an email directed to each John Doe at the last known email address in Allnurses' records), the Court concludes that neither the Vacation Order, nor the law requires such additional steps.

3. Ex Parte Communications by John Does

In Allnurses' proposed Legal Notice Page, Allnurses included a provision that informed the John Does that they did not need to reveal their identity or identifying information to respond to the motion, and indicated they could contact the Court by directing all correspondence to the Court to prevent disclosure of their identity. Plaintiffs

objected to any ex parte communications with the Court, and urged that the John Does should not be given legal advice on how to proceed with their response to the motion.

The Court finds that the Legal Notice Page adequately addresses the concerns raised by both parties. The John Does must be informed and reassured that by responding to the motion to compel their identities that they are not required to reveal their identities to the parties to do so. And, they must be given (and informed of) the mechanism to protect their identities from being shared with the parties when responding to the motion. Legal advice is not being given to the John Does. Instead, the Legal Notice Page only sets forth the process for responding to the motion while protecting the identity of any John Doe who chooses not to share it.

4. Access to Sealed Portions of Parties' Submissions

The Court has issued a Protective Order [Docket No. 83], which allows a party to designate and file with the Court any document as "Confidential" or "Confidential – Attorney's Eyes Only," including interrogatory responses, other discovery responses, or transcripts, that it in good faith contends to constitute or contain trade secret or other confidential information (collectively, "protected material"). Pursuant to this Order, protected material can only be disclosed to certain individuals and with limited exceptions, to non-parties who do not have access to them. Consequently, as no John Doe has been identified, much less served with or answered the Complaint (i.e. no John Doe is yet a party to the suit), these individuals are not permitted to examine any protected material submitted by plaintiffs or Allnurses in connection with plaintiffs' motion to compel.

To address this situation, any protected material submitted by plaintiffs or Allnurses in connection with plaintiffs' motion to compel or any pleading referencing the contents of such material, shall be governed by Paragraph 11 of the Protective Order, and the John Does shall not have access to the protected material or that portion of the pleading referencing the contents of this material. Thus, if either plaintiffs or Allnurses have included any protected material or referenced the contents of any such material in the pleadings of their respective submissions, then they may file under seal that material or pleading containing the material and shall publically file a redacted version of that material or pleading.² The John Does shall only have access to the redacted version of that protects material or pleading, unless otherwise ordered by the Court.³

Dated: August 22, 2016

Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

² If plaintiffs file a redacted version of their submission in support of their motion to compel, it is the redacted version that shall be linked to the Legal Notice Page.

³ At the hearing, plaintiffs' counsel wanted assurance that any protected material filed under seal or any pleading referencing the contents of such material, would never be disclosed to a John Doe, who is not a party to or governed by the Protective Order. In particular, counsel was concerned that if a John Doe was not represented by counsel (who is an officer of the Court and to whom the information could be provided pursuant to an Attorney's Eyes Only provision), there would be no vehicle to insure that the John Doe would not misuse the protected material. The Court understands and sympathizes with this concern. But, it cannot anticipate every circumstance and every argument an unrepresented John Doe might proffer to learn the contents of any protected material filed by the parties in connection with the motion to compel, nor can it categorically state that this information will never be disclosed to an unrepresented John Doe. What the Court can say is that it would not disclose to an unrepresented John Doe any protected material without first giving the designating party the opportunity to weigh in on and object to the request for disclosure.

EXHIBIT A

Banner:

LEGAL NOTICE TO THE FOLLOWING ALLNURSES SUBSCRIBERS: Pixie.RN, JustBeachyNurse, monkeyhq, duskyjewel, and LadyFree28. An Order has been issued by the United States District Court for the District of Minnesota that affects you. Click here for more information [[hyperlink to Legal Notice Page](#)].

EXHIBIT B

Legal Notice Page

LEGAL NOTICE TO THE FOLLOWING ALLNURSES SUBSCRIBERS:

1. Pixie.RN,
2. JustBeachyNurse,
3. monkeyhq,
4. duskyjewel, and
5. LadyFree28

collectively, referenced in this Notice as “John Doe Defendants.”

This Notice is provided to you in connection with a lawsuit (“Lawsuit”) in the District of Minnesota with the following caption:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

EAST COAST TEST PREP LLC d/b/a) Achieve Test Prep, and MARK OLYNYK,)) Plaintiffs,)) v.)) ALLNURSES.COM, INC., DAVID R.) SMITS, <i>as Administrator of the Estate of</i>) <i>Brian Short</i> , ABC COMPANIES 1-10 and) JOHN DOES 1-10,)) Defendants.	Case No. 15-cv-03705 JRT-JSM
---	------------------------------

In this Lawsuit, Plaintiffs (East Coast Test Prep LLC d/b/a Achieve Test Prep, and Mark Olynyk) allege in their Second Amended Complaint filed on January 22, 2016 (Docket No. 97), among other things, that the John Doe Defendants posted on the Allnurses.com Website false and defamatory statements about East Coast Test Prep, d/b/a/ Achieve Test Prep, causing injury to plaintiffs.

Plaintiffs are seeking to learn the identity of each of the John Doe Defendants from Defendants Allnurses.Com, Inc., and David R. Smits, as Administrator of the Estate of Brian Short (collectively, “Allnurses”) through a Motion to Compel Discovery filed on _____[date] (Docket No. _____) in the Lawsuit. Defendants object to providing any information that discloses the identity of the John Doe Defendants.

This Notice is provided to you pursuant to several Orders, which are listed below.

Plaintiffs' Motion to Compel Discovery will be heard by Magistrate Judge Mayeron on _____ at ____ [a.m./p.m.] in Courtroom 9E, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota. You may attend this motion.

Any John Doe Defendant objecting to Plaintiffs' Motion to Compel Discovery must file with the Clerk of Court for the District Court of Minnesota a written response to the motion and serve a copy on all counsel of record by _____ [date]. The address of the Clerk of Court and counsel of record are below.

Clerk of Court:

Clerk of Court for District Court of Minnesota
300 South Fourth Street
202 U.S. Courthouse
Minneapolis, MN 55415
(612) 664-5000

Counsel of Record:

Plaintiffs' Counsel:

Richard L. Ravin
Hartman & Winnicki, P.C.
74 Passaic Street
Ridgewood, NJ 07450

Allnurses' Counsel

John D Reddall
Kretsch Law Office, PLLC
17850 Kenwood Trail
Suite 219
Lakeville, MN 55044

If you are not represented by a lawyer, you must include with your written response, your name, address and phone number. However, if you do not want to reveal your identity (name, address and phone number) to the parties, you may do this by (a) filing with the Clerk of Court and serving on counsel of record for the parties a written response that redacts (hides or removes) your name, address and phone number, and (b) by sending an unredacted version of the same written response to Magistrate Judge Mayeron at the address below.

The Honorable Janie S. Mayeron
Magistrate Judge, District of Minnesota
United States District Court

9E U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
mayeron_chambers@mnd.uscourts.gov
(612) 664-5460

Magistrate Judge Mayeron will not disclose your name, address and phone number to Plaintiffs, Allnurses or counsel of record for these parties. The Court will only use this information to communicate to you about the motion, including the outcome of the motion.

Allnurses may file its response papers to Plaintiffs' Motion to Compel by _____ [date], and Plaintiffs may file reply papers to Allnurses' response by _____ [date].

A copy of the relevant litigation documents (e.g. Second Amended Complaint, relevant Orders and Plaintiffs' Motion to Compel) are available pursuant to the links below. If you seek additional documents filed with the Court, you may contact the Clerk of Court at the above address or phone number.

Second Amended Complaint, dated January 22, 2016, with Exhibits "A" through "F" (Docket No. 97) # 1, # 2, # 3, # 4, # 5, # 6, # 7

Order Vacating the Order of Magistrate Judge Dated December 18, 2015 and Denying Plaintiffs' Discovery Motion, dated March 7, 2016 (Docket No. 129)

Order dated May 19, 2016 (Docket No. 144)

Order as to Content and Modality of Notice, dated ____ (Docket No. ____)
[Order Affirming / Modifying Order As To Content and Modality of Notice dated ____ (ECF ____)]

Plaintiffs' Motion To Compel Discovery, dated ____ (Docket No. ____)
#1, #2, #3, etc.