STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

QUIXTAR, INC., a Virginia Corporation,
Plaintiff,
v.

JOHN DOE 1 through JOHN DOE 30, individuals,
Defendants.

Case No. 07-59739-CZ
Hon. Calvin L. Bosman

WARNER NORCROSS & JUDD LLP
Edward J. Bardelli (P53849)
Attorneys for Plaintiff
111 Lyon Street, NW, Ste 900
Grand Rapids, MI 49503
(616) 752-2000

BRINKS HOFER GILSON & LIONE
Bradley L. Smith (P48138)
Attorneys for Plaintiffs
524 S. Main St.
Ann Arbor, MI 48104
(734) 302-6032

Daniel A. O'Brien (P42120)
Attorney: John Does 1-5, 8, 9, 12-18, & 21
1060 E. West Maple Rd.
Walled Lake, MI 48390
(248) 669-7281

MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (8) & (10) AND TO QUASH SUBPOENAS; AND FOR PROTECTIVE ORDER

NOW COME John Doe Defendants 1-5, 8, 9, 12-18, & 21, by and through their attorney, Daniel A. O'Brien, and for their Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (8) & (10), and to Quash Subpoenas, and for Protective Order, state as follows:

1. Quixtar's Complaint is a cynical, vindictive assault on the constitutional rights of private citizens to freedom of speech and freedom of association enshrined in the 1st Amendment of the US Constitution and Article 1, sections 3 & 5, of the Michigan Constitution.
2. Quixtar's cynicism in this case is illustrated almost no place more clearly than in its news release at its "Alticor Media Blog" where Quixtar claims that the sole purpose of this

case is find out if Orrin Woodward, a man against whom Quixtar filed a lawsuit in neighboring Kent County, is responsible for any of the websites named in this case; Quixtar's article attacking the anonymous bloggers states in relevant part:

> "We filed suit this week in Ottawa County, Michigan seeking to learn more about a number of "John Does" who have cropped up online since our dispute with Orrin Woodward and TEAM began.
>
> "Because we believe we can prove that some of their sites and posts were engineered or directed by Woodward, TEAM, their lawyers or their PR Agency. And that those sites were purposely used to post material that violates a court order." (Exhibit A, "Guerilla's in the midst.")

3. The "court order" referred to in the article was entered by Hon. Paul Sullivan in Kent County on August 24th, in the case of *Quixtar v Woodward, et al.,* pending case No. 07-08413-CK; Quixtar makes the same allegations in that case that it does in this case. (See Exhibit B, excerpts of Verified Complaint, and JAMS Arbitration complaint.)
4. In the Kent County case, Quixtar alleged that *Woodward, et al.,* were and are engaging in activities which injure its reputation and interfere with its business relations with Quixtar IBOs, in that the defendants were allegedly,

    a. "Encouraging or soliciting other IBOs to resign from Quixtar and compete with the business of Quixtar.

        "Engaging in activities injurious to the reputation of Quixtar including, but not limited to, disparagement of the Quixtar opportunity as part of their ongoing effort to wrongfully solicit Quixtar IBOs to leave Quixtar and compete with the business in violation of their contracts with Quixtar." (See Exhibit B, excerpts of Complaint, *Quixtar v Woodward, et al.,* 07-08413-CK, paragraph 57.)

5. Quixtar made these same allegations in its "JAMS Arbitration" complaint, which was attached to its Complaint in Kent County. (See, e.g., Ex B, excerpts of Quixtar's *JAMS Arbitration - Statement of Claims,* paragraphs 64 & 71.)
6. In fact, Quixtar's JAMS Arbitration complaint specifically alleged in Claims II & III that defendants disparagement of Quixtar, and other actions "injurious to Quixtar's

reputation," interfered with Quixtar's present and future business relationships. (See Ex B, excerpts of JAMS Arbitration complaint, paragraphs 74-86.)

7. The Kent County Complaint and the attached JAMS Arbitration complaint also allege that the defendants improperly used Quixtar's confidential or trade secret information to compete with Quixtar, and encouraged other Quixtar IBOs to do so as well. (See, e.g., Ex B, excerpts of Complaint, paragraph 57; and excerpts of JAMS Arbitration complaint, paragraphs 64, 73, 90-93.)

8. Quixtar makes virtually identical allegations against the Defendants in this case:

> "Defendants have, either individually or in concert, intentionally and improperly interfered with Quixtar's contracts with its IBOs through the Internet postings and websites identified above, including but not limited to:
> "(a) encouraging Quixtar IBOs to resign from the Quixtar business;
> "(b) telling Quixtar IBOs to stop building their Quixtar business;
> "(c) telling Quixtar IBOs not to purchase certain Quixtar products;
> "(d) encouraging Quixtar IBOs to improperly compete with the business of Quixtar or its IBOs in breach of their contracts with Quixtar;
> "(e) causing one or more Quixtar IBOs to improperly solicit other IBOs in breach of their contracts with Quixtar;
> "(I) causing one or more Quixtar IBOs to improperly use Quixtar's confidential and proprietary line of sponsorship information in breach of their contracts with Quixtar; and
> "(g) disparaging Quixtar, its products and prices." (Complaint, *Quixtar v John Does 1 through 30,* Ottawa County case no. 07-59739-CZ, paragraph 30; see also Complaint, paragraphs 37-38, 41-42.)

9. While there undoubtedly are many reasons why Quixtar would not want to file this lawsuit in Kent County, the immediate reason is that Judge Sullivan denied Quixtar's motion for expedited discovery in Quixtar's Kent County case; Quixtar sought the exact same relief that Quixtar claims it is seeking in this case – i.e., proof that "their sites and posts were engineered or directed by Woodward, TEAM, their lawyers or their PR Agency. And that those sites were purposely used to post material that violates a court order." (See paragraph 2 above, and Exhibit A.)

10. At oral argument before the Hon. Paul Sullivan on September 26th, Quixtar's attorney, Ed Bardelli, (who is Quixtar's attorney in this case), specifically requested discovery into websites that were speaking out against Quixtar's actions:

> ". . . ***there are websites out there, like FreeTheIBO.com, that are set up by the PR firm, that contain disparaging remarks about Quixtar, and we need additional discovery on those issues as well.*** And frankly, your Honor, if they were complying with the Court order, they wouldn't have anything to hide with respect to discovery. But I would submit to the Court that the reason why they don't want the order clarified, the reason why they don't want the order to say this applies to anyone acting in concert with the defendants, and that includes ***TEAM, and the TEAM affiliated -- the TEAM IBOs or others affiliated with TEAM***, is because it's going to stop what they are doing." (Exhibit C, excerpt of Transcript of Hearing, September 26, 2007, page 89.)

11. Judge Sullivan denied Quixtar's request for the discovery, stating that in previously ordering the case to arbitration, it was his intention that such discovery issues should be handled by the arbitrator:

> "**Relative to the discovery,** I understand why they are asking for it. My own sense is this: The whole issue that came before me, or the major part of that issue that came before me when I was first approached about this order, was this is something that ought to be in arbitration. And I totally, 100 percent agree. Frankly, I saw this as a matter that the Court would issue its injunctive order, sit back and let the arbitrator get into it and resolve the differences that these parties have. And to the extent that there are violations, do what he or she or they can to remedy those violations.
>
> "I suppose it would be nice to give each side all kind of discovery rights to go out and see how one side or the other is doing something. I'm not -- I don't intend to make a trial out of this thing. This hearing will be long enough when we decide whether there's been a violation of my order. Ultimately, **this is for arbitration. If there's going to be discovery, it can be part of arbitration.**" (Ex C, Trans, p 101.)

12. This lawsuit, therefore, is merely an attempt to obtain the discovery that Quixtar was denied in a parallel case that is still pending before Judge Sullivan – Quixtar's self-proclaimed do-good intentions aside, this is unadulterated forum shopping of the most egregious kind.

13. Defendants submit that this case should be dismissed on principles of collateral estoppel.

14. Collateral estoppel is a rule of issue preclusion that prevents a party from relitigating issues that have been actually or necessarily decided in another case involving the same parties, or their privies. *Leahy v Orion Twp,* 269 Mich App 527, 530; 711 NW2d 438 (2006).

15. Despite the fact that these are John Doe defendants, and therefore it cannot be directly determined that they are in privity with any parties in the Kent County case, it is reasonable to conclude for the purpose of this motion that they do, in fact, have similar interests in the outcome of the Kent County litigation.

16. In fact, given Quixtar's express statements concerning its suspicions about the websites, and the purpose of this lawsuit, which Quixtar made in argument before Judge Sullivan, and reiterated in its blog article, Quixtar would be hard-pressed to claim that these John Doe defendants do not have a similar interest, or that this lawsuit is not related to the pending Kent County case. See *Maiden v Rozwood,* 461 Mich 109, 125; 597 NW2d 817 (1999), fn 8; MRE 801(d)(2)(A).

17. Defendants submit that the fact that the Kent County case is still pending, is not fatal to defendants' request for dismissal on principles of collateral estoppel – obviously, the purpose of the "finality" element is not substantive, but merely a safeguard to prevent a party from being prejudiced by a prior dismissal which was not on the merits, and therefore not a dismissal that a party aggrieved by an intermediate ruling in the case would normally appeal – the essence of collateral estoppel is that a second court should not be called upon to decide an issue already decided in a court of competent jurisdiction, since to do so would lead to inconsistent rulings and encourage forum-shopping.

18. This lawsuit flies in the face of Judge Sullivan's ruling in the Kent County case – Quixtar could have filed an interlocutory appeal, but it chose not to do so; instead Quixtar chose

to attempt to circumvent Judge Sullivan's ruling by running to this Court, under the apparent delusion that this Court would support its blatant forum shopping.

19. Under long-standing principles of jurisprudence established to protect the integrity of the judicial process, this Court should dismiss this case, since "forum-shopping undermines the essential integrity of the judicial system, on which litigants and the public must be able to depend." *Feiger v Cox,* 274 Mich.App. 449, 459; 734 N.W.2d 602 (2007).

20. Indeed, Michigan appellate courts have routinely held that, when a litigant fails to exercise its appellate rights, but instead files another case in another court, a circuit court abuses its discretion and exceeds its authority when it accepts the new case and rules on issues previously decided by the other court:

> Clearly, the circuit judge should have refused to hear a matter that should have been appealed if plaintiffs were dissatisfied with the district court's orders. Instead, the circuit judge exceeded his authority and then improperly rewarded plaintiffs' forum-shopping, first, by wrongfully taking the case and, second, by improperly interfering with a legitimate and proper investigation by the Attorney General." *Feiger,* 274 Mich App at 452.

21. As shown above, this case makes virtually identical allegations as are found in Quixtar's Verified Complaint and JAMS Arbitration complaint, which it filed in Kent County, the requests for relief are virtually identical, and the purpose of the complaints are virtually identical; further, the information sought in the subpoenas in this case, (See Exhibit D), is virtually identical to the discovery demand that Judge Sullivan denied in the Kent County case, and specifically referred to arbitration.

22. Therefore, Defendants respectfully submit that this court is compelled by *Feiger, supra,* and similar case law, to dismiss this case with prejudice.

23. Pursuant to MCR 2.116(C)(7) & (10), defendants request this Court to dismiss Plaintiff's Complaint in its entirety as to all defendants, because the issues raised in the Complaint

were "actually or necessarily" decided in another case, and further, because the filing of the Complaint in this Court constitutes improper forum shopping.

24. Another reason that Quixtar is attempting to manipulate venue is to avoid the possibility of Orrin Woodward & Chris Brady being able to defend themselves against Quixtar's latest attack.

25. Quixtar is just as obviously concerned about what exposure of the truth about Quixtar contained in the John Doe defendants' parodies, satires, and commentary would do to its case in Kent County.

26. Thus does Quixtar, out of anger at its arch-nemeses Woodward & Brady, take an axe to the constitutional rights of private citizens – to conduct discovery in another case.

27. Outrageous!

28. Quixtar's weak allegation that "Defendants caused their Internet postings to be published throughout the State of Michigan, including Ottawa County," is insufficient to support its perfunctory claim that "Venue is properly laid in this Court pursuant to MCL 600.1627." (Quixtar Complaint, paragraph 26.)

29. MCL 600.1629 is the proper statute for determining venue in tort cases such as this one, not 600.1627, which limits its venue provision to only those actions that are NOT "founded on contract and actions provided for in sections 1605, 1611, 1615, and ***1629***."

30. Defendants specifically reserve their right to file a motion for change of venue under MCR 2.221 et seq., "before or at the time defendant files an answer" to the complaint; Defendant's respectfully submit that, while proper venue is not in Ottawa County, it also very possibly is not in Kent County; further, Defendants respectfully submit that they are concerned that revealing their home states and cities would compromise their anonymity, and defendants, therefore, reserve the right to litigate this issue when it becomes necessary.

31. Defendants further give notice that one or more of the John Doe defendants is/are resident(s) of another state, and therefore specifically reserve their right to file a petition to remove this case to federal court pursuant to the federal court's original diversity jurisdiction under 28 USC 1332.
32. In pursuance of their stated objective to use this case to gather evidence for Quixtar's lawsuit against Orrin Woodward in Kent County, Quixtar's attorneys prepared subpoenas to obtain personal identification information of the registrants of the John Doe web sites, which are serviced by a number of Internet Service Providers (ISPs), including, among others, Goddaddy.com, Inc., which is headquartered in Arizona, and Google.com, which is headquartered in California. (See Exhibit D, Subpoena to Godaddy.com, and related documents.)
33. Defendants request this Court to quash those subpoenas, and to issue a protective order to prevent Quixtar from using other means to obtain the information for the reasons already stated above, and the reasons that (a) the complaint violates the defendants rights to free speech and freedom of association provided for in the US and Michigan Constitutions, and (b) should be dismissed pursuant to MCR 2.116(C)(8) & (10), because the Complaint fails to state a claim upon which relief can be granted, and Plaintiff cannot produce sufficient evidence to support its claims.
34. There does not appear to be any prior Michigan appellate court case dealing with this issue, and therefore this is a case of first impression in this state.
35. When determining the issue raised in this case, it is important to recall that the First Amendment of the US Constitution and Article 1 section 5 of the Michigan Constitution provide for the right of every individual to "free speech."

36. Bound up with that right, and absolutely necessary to it, if free speech is to be protected and encouraged, is the right to speak anonymously. *McIntyre v. Ohio Elections Commission,* 514 US 334, 341-342 (1995).

37. During the past few years, a number of John Doe "blogger" cases such as this case have been working their way through the court system to the point where there are now a number of state and federal courts which have ruled on the issue of whether, and on what conditions, a court may grant the Plaintiff in such suits discovery of the John Doe defendant's personal identification information held by third-party internet service providers (ISPs). See, e.g., *Reunion Industries Inc. v. Doe 1*, 2007 WL 1453491 (Pa.Com.Pl.), 80 Pa. D. & C.4th 449, 35 Media L. Rep. 1917 (2007) (reviewing authorities, finding summary judgment standard strikes appropriate balance, and staying discovery of anonymous poster's identity pending further order of court).

38. Every Court, without exception, has applied a heightened standard of proof on the Plaintiff, well beyond the normal standards established by local court rules for discovery requests, before the court would permit discovery of a John Doe Defendant's identity. See, e.g., *Reunion Industries, supra.*

39. This is reasonable, since without such heightened standards, the protection of a person's constitutional right to speak without his identity being known would be subject only to the vagaries of an allegedly aggrieved party's willingness to file a lawsuit.

40. Review of case law, and scholarly articles on the subject, reveal that the clear weight of authority in state and federal courts throughout the country is to require the Plaintiff to make a preliminary showing of the strength of its claims before being permitted to discover the identity of persons who publish information anonymously on the internet. See e.g., *Doe v Cahill,* 884 A.2d 451, 460 (Del 2005), ("Before a defamation plaintiff can obtain the identity of an anonymous defendant through compulsory process, he must

support his defamation claim with facts sufficient to defeat a summary judgment motion); *Lassa v. Rongstad*, 294 Wis.2d 187, 212-15, 718 N.W.2d 673, 686-87 (2006) (defamation claim must survive motion to dismiss before allowing discovery into identity of anonymous internet speaker); *Best Western International, v. Doe,* 2006WL2091695, *3 - 5 (D.Ariz. 2006) (denying subpoena where complaint failed to even allege a false statements or make a prima facie case for any tort); *Reunion Industries Inc. v. Doe 1*, 2007 WL 1453491 (Pa.Com.Pl.), 80 Pa. D. & C.4th 449, 35 Media L. Rep. 1917 (2007) (reviewing authorities, finding summary judgment standard strikes appropriate balance, and staying discovery of anonymous poster's identity pending further order of court); *Dendrite International v Doe,* 342 NJ Super. 134; 775 A. 2d. 756 (NJ Super. Ct. App. Div. 2001), (before permitting discovery, Plaintiff's Complaint must state a claim upon which relief can be granted, and Plaintiff must present sufficient evidence on each element of the claim to support a prima facie case). (See attached cases and law review articles.)

41. The first case of significance is the decision in *Dendrite International v Doe,* 342 NJ Super. 134; 775 A. 2d. 756 (NJ Super. Ct. App. Div. 2001), in which the New Jersey Superior Court held that before permitting discovery, the Plaintiff's Complaint must state a claim upon which relief can be granted, and Plaintiff must present sufficient evidence on each element of the claim to support a prima facie case.

42. Subsequent to that case, the first Supreme Court of any state to issue an opinion on this issue was *Doe v Cahill,* 884 A.2d 451, 460 (Del 2005), in which the court thoroughly analyzed the standard of *Dendrite, supra,* and devised a modified standard of review that still requires the Plaintiff to present sufficient evidence to survive a summary judgment motion before the court can issue a subpoena for the personal identification information of anonymous bloggers; the court eschewed the *Dendrite* element of determining whether

the complaint states a claim, because Delaware is a notice pleading state, and the court understood that the "statement of a claim" element is subsumed in the "summary judgment" standard requiring evidence establishing a *prima facie* case on each element of the claim.

43. Since then, it appears that a number of courts have analyzed and followed the standard of review set forth in *Doe v Cahill, supra,* See, e.g., *Reunion Industries Inc. v. Doe 1*, 2007 WL 1453491 (Pa.Com.Pl.), 80 Pa. D. & C.4th 449, 35 Media L. Rep. 1917 (2007) (reviewing authorities, finding summary judgment standard strikes appropriate balance, and staying discovery of anonymous poster's identity pending further order of court); see also, Vincent, Charles B., *CYBERSMEAR II: BLOGGING AND THE CORPORATE REMATCH AGAINST JOHN DOE,* 31 Del. J. Corp. L. 987 (2006).

44. As just indicated, a close reading of both *Dendrite, supra,* and *Doe v Cahill, supra*, reveals that they employ standards of review that are virtually identical in important respects, most significantly in the fact that both require the Plaintiff to satisfy a "summary judgment standard" before a subpoena can be issued:

> "Thus, to obtain discovery of an anonymous defendant's identity under the summary judgment standard, a defamation plaintiff "must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question." In other words, the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff's control. Doe v Cahill,* 884 A.2d at 463.

45. Initially, Defendants submit that Plaintiff's Complaint in this case does not meet even the preliminary level of review established *a fortiori* in *Dendrite, supra,* and *Doe v Cahill, supra*, i.e., Quixtar's Complaint does not even state a claim upon which relief can be granted, under the standard of MCR 2.116(C)(8).

46. Plaintiff's Complaint appears to state mixed allegations of tortuous interference with business relations, and defamation.

47. The general rules of pleading in Michigan require Plaintiff to make "a statement of the facts," including "specific allegations" supporting its claims. MCR 2.111(B)(1).

48. Michigan law requires a Plaintiff to plead defamation with specificity; a mere statement of a pleader's conclusions, unsupported by specific allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State,* 258 Mich App 260, 272; 671 NW2d 125 (2003); *Gonyea v MPFCU,* 192 Mich.App. 74, 77; 480 N.W.2d 297 (1992); *Ledl v Quick Pik,* 133 Mich App 583, 589; 349 NW2d 529 (1984).

49. The Plaintiff is required to specifically identify the defamatory or false statements and must expressly state how the defendant is liable in tort for publication of such statements. *Royal Palace v Channel 7,* 197 Mich App 48, 51-53; 495 NW2d 392 (1992).

50. "Specifically identifying" the defamatory statements includes setting out the very words that the plaintiff contends are libelous. *DeGuvera v Sure Fit,* 14 Mich App 201, 206; 65 NW2d 418 (1968).

51. If the plaintiff fails to satisfy the specificity requirements, then summary disposition under MCR 2.116(C)(8) would be appropriate for failure to state a claim. *Royal Palace,* 197 Mich App at 57.

52. Similarly, the Plaintiff must allege *with specificity* a cause of action for tortious interference, particularly the "intentional interference" element, which requires the pleader to "allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the ... business relation of another." *CMI International v Intermet International,* 251 Mich App 125, 131; 649 NW2d 808 (2002).

53. The law is clear that "mere statements of the pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Svc v Rockford Ambulance,* 204 Mich App 392, 295; 516 NW2d 498 (1994).

54. "A wrongful act *per se* is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v RL Polk Co,* 193 Mich App 1, 12-13; 483 NW2d 629 (1992), (emphasis added).

55. Plaintiffs' Complaint fails to state a claim with sufficient specificity under either tortious interference or defamation, and therefore is insufficient to satisfy Plaintiff's burden in order to subpoena the personal identification information of the John Doe defendants from the ISPs.

56. Plaintiffs' Complaint is replete with general allegations of wrongdoing, but nowehere does Plaintiff even attempt to set forth a single statement of any of the John Doe defendants named in its Complaint.

57. Since Plaintiff failed to set forth any such statements, it follows that the Complaint fails to set forth facts with sufficient specificity to determine that the statements were not mere statements of opinion, hyperbole, or fair comment about a matter of public interest, which are normally not actionable under either theory, *Milkovich v Loraine Journal,* 497 U.S. 1, 17-20; 110 S.Ct. 2695; 111 L.Ed.2d 1 (1990), and not sufficient to satisfy Plaintiff's burden.

58. It seems clear from Plaintiff's own public broadcast of its filing of this case against thirty private citizens, (see Exhibit A), that Quixtar regards it as a matter of public interest.

59. Further, under the standards of *Milkovich, supra,* and the constitutional law cases cited above, Plaintiff and its principles and representatives are arguably public figures, if not generally, then for the purpose of the speech in this case, which they themselves have thrust into the public forum through such forums as the "Alticor Media Blog."

60. Further, Plaintiff's Complaint does not state a single specific fact from which it could be determined that a single person in Ottawa County actually viewed any of the web sites, or that Plaintiff sustained any actual damage from the specific statements allegedly made by

the John Doe defendants, rather than as a result of Quixtar's ham-handedness in its business dealings.

61. Plaintiff's "unfair competition" claim is just a rehash of its tortious interference, and defamation claims; "misleading," "falsely disparaging," and "manifestly unfair, unethical, and improper."

62. Michigan's common law of unfair competition is in sync with the general law in federal and state courts throughout the country. See *Clairol v Boston Discount Center,* 608 F2d 1114, 1118 (CA 6, 1979):

> "The gist of the action in . . . unfair competition cases, is fraud, and the gist of the charge is that the public is so misled that plaintiff loses some trade by reason of the deception." *Id.*

63. Fraud must be specifically pleaded, and must rest on a statement regarding a past or an existing fact - the Michigan Court Rules specifically require in fraud cases that allegations of fact "must be stated with particularity," MCR 2.112(B)(1). *Baker v Arbor Drugs, Inc,* 215 Mich App 198, 208-209; 544 NW2d 727 (1996).

64. As with Plaintiff's attempt to plead tortious interference and defamation, Plaintiff's allegations are too general and conclusory to state a claim for unfair competition, and therefore Plaintiff has not met its burden of proof in order to subpoena the personal identification information of any of the John Doe defendants named in its Complaint.

65. Therefore, in order to protect the constitutional rights of these John Doe defendants to freedom of speech and freedom of association enshrined in the 1st Amendment of the US Constitution and Article 1, sections 3 & 5, of the Michigan Constitution, these John Doe defendants request this Court to enter an Order quashing Plaintiff's subpoenas, and further Order that Plaintiff may not attempt to use any means, including civil process, to obtain the personal identification information of any John Doe defendants.

66. Even if this Court finds that Plaintiff's Complaint states a claim upon which relief can granted, the Defendants submit that Plaintiff's cannot meet the ultimate standard established in *Dendrite, supra,* and *Doe v Cahill, supra*, in that Plaintiff cannot present sufficient evidence to withstand a motion for summary disposition pursuant to MCR 2.116(C)(10).

67. In determining whether Plaintiff can meet these standards, it is important to place any statements of the Defendants in the context of the media climate created by Quixtar's own actions, which were prior to creation of any of the web sites named in Plaintiff's Complaint.

68. As stated in Quixtar's own blog article, "Guerillas in the midst," this lawsuit concerns a company known as TEAM and its founders, particularly Orrin Woodward, and "their lawyers." (See Exhibit A.)

69. According to that same article, the blogs named in this lawsuit are "engineered or directed" by TEAM and its leaders.

70. On August 10th, immediately after allegedly terminating all of the highest leaders in TEAM, Quixtar began posting blog articles on its web site, "Alticor Media Blog," which it styles, "the official news weblog from the Alticor family of companies." (Ex A.)

71. In that first article, provocatively titled, "Just go, Team," (Exhibit E), Quixtar states:

- ". . . the way Orrin Woodward ran his organization was a disgrace to every person who's ever tried to build a Quixtar or Amway business the right way."
- ". . . Orrin Woodward was a poster child for a long list of bad business practices that our critics hate about our company. The other leaders we terminated – including Chris Brady, Billy Florence, Don Wilson, Randy Haugen, Tim Marks and Chuck Goetschel – also showed they were unwilling to reform."
- ". . . We got ignored, we got lied to, and, boy, we got the runaround.
- ". . . So he's gone, and so are others. We are doing our best to repair the relationships Orrin Woodward damaged and protect the businesses of the people in his organization that Orrin Woodward betrayed."

72. Quixtar has posted numerous articles of the same tenor for the past two months straight, including articles attacking individual IBOs who are being regularly harassed by threatening emails from the acknowledged ring-leaders of Quixtar's assault on the Team organization and every IBO connected with Team; in fact, a lawsuit filed by several of those IBOs against Quixtar based upon those threatening emails is pending before the Hon. Mark A. Goldsmith of Oakland Circuit Court, in the case of *Freeze, et al., v Quixtar,* case no. 2007-085295-CK; Judge Goldsmith has issued a Temporary Restraining Order against Quixtar and ordered an evidentiary hearing in that case; incredibly, despite the TRO, Quixtar has continued its harassment of Team-affiliated IBOs, and a show cause hearing for contempt against Quixtar is scheduled for November 2nd.

73. Further, the Independent Business Owners Association International, a board of IBOs established to protect the IBOs, "mysteriously" began its own blog site on August 13th for the specific purpose of publicizing the "recent Quixtar terminations of contracts" of Team-affiliated IBOs; and its first article, not surprisingly, was a gratuitous attack upon Team-affiliated business leaders, (See Exhibit E); more than half of the IBOAI's articles have been about the legal battles between Quixtar and Team affiliated IBOs; some of these articles were identical to articles, already posted by Quixtar on its own blog.

74. Another site at which Quixtar began posting Team-related articles is "Ada-tudes."

75. All of these Quixtar web sites provide a forum for "anonymous" bloggers to post literally thousands of defamatory statements about Team, its leaders, and Team-affiliated IBOs.

76. Although there is no way of determining how many of these "anonymous" posts were actually posted by Quixtar's own leaders, lawyers, and employees, it is clear that Quixtar is facilitating and promoting such defamatory blogging against Team by posting, retaining, and promoting them.

77. This, then, is the Quixtar-engineered cesspool out which Quixtar's lawsuit arises!

78. Given this context, it is clear that all of the John Doe blogs and videos named by Quixtar in this case are merely "fair comment" or fair response to an issue that Quixtar clearly believes is a matter of public concern, and for which it believes a public forum should be provided – fortunately, Quixtar doesn't control the entire forum that it has chosen.

79. In *Doe v Cahil, supra,* the court noted that the context of a statement is critical to determining whether it is, in fact, defamatory:

> "Whether or not a statement is defamatory is a question of law. In answering this question, Delaware courts must determine: "*first,* whether alleged defamatory statements are expressions of fact or protected expressions of opinion; and [*second*], whether the challenged statements are capable of a defamatory meaning." Because this question is one of law, a judge can just as easily make the determination under a summary judgment standard as under a motion to dismiss standard or a good faith standard. The judge will have before him the allegedly defamatory statements and can determine whether they are defamatory based on the words and the context in which they were published." *Id.,* at 463.

80. Defendants submit that in this context, where Plaintiff itself has created, fomented and preserved such outrageous and defamatory statements as are found in its own articles, such as in its article, "Just go Team," and in "anonymous" postings against Team by irate, pro-Quixtar bloggers, including allegations of fraud, misrepresentation, deceit, etc., virtually no statement in any of the web sites identified in Quixtar's complaint could constitute actionable defamation, since all such statements would be a matter of fair comment on issues of public concern. *Milkovich v Loraine Journal,* 497 U.S. at 17-20.

81. Further analysis of these issues is not possible without Quixtar first identifying statements that it considers defamatory, tortious interference, or unfair competition.

82. Defendants submit that on the basis of available evidence, in light of the vague and conclusory allegations of Quixtar's complaint, Defendants are entitled to judgment as matter of law, and, therefore, Defendants request this Court to dismiss the complaint pursuant to MCR 2.116(C)(10).

83. On the basis of the above analysis, pursuant to *Doe v Cahill, supra,* and *Dendrite, supra,* Defendants further request this Court to quash any subpoenas issued by Quixtar and its lawyers, and further enter a protective order prohibiting Quixtar from obtaining the personal identification of any John Doe defendants named in the complaint, or of any other persons similarly situated.

84. In the alternative, Defendants request an evidentiary hearing into the allegations to determine whether there is sufficient evidence to support its complaint.

WHEREFORE, John Doe Defendants 1-5, 8, 9, 12-18, & 21, request this Court to grant their motion and enter an Order Quashing Plaintiff's Subpoenas, and further enter a protective Order prohibiting Plaintiff from using any means, including civil process, to obtain the personal identification information of any John Doe defendants, until further Order of this Court after a hearing on reasonable notice to all John Doe defendants, and opportunity of the defendants to be heard; in the alternative, Defendants request an evidentiary hearing.

Respectfully submitted,

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Daniel A. O'Brien (P42120)
Attorney: John Does 1-5, 8, 9, 12-18, & 21
(248) 669-7281

Dated: October 15, 2007

BRIEF IN SUPPORT

Defendants restate the allegations of their Motion to Quash Subpoena and for Protective Order, and incorporate them by reference as if more fully stated herein. Defendants rely upon their constitutional rights as private citizens to freedom of speech and freedom of association enshrined in the 1st Amendment of the US Constitution and Article 1, sections 3 & 5, of the Michigan Constitution, and related case law, statutes, and court rules, in support of their motion.

In the seminal case of *Doe v Cahill,* 884 A.2d. 451 (2005), the Delaware Supreme Court set forth the substantial constitutional concerns raised by cases where, as here, the Plaintiff seems

bent on learning the names of heretofore anonymous internet "town criers", in order to intimidate them into silence:

> "We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the Superior Court, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.
>
> "Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "[t]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked." *Doe, supra,* (Westlaw pp 7-8).

Here we have a Plaintiff that is so brash that Quixtar admits in its press release, "Guerrillas in the Midst," that it is using this lawsuit against thirty private citizens as a mere tool in its ongoing battle against Orrin Woodward and Chris Brady:

> "**<u>To us</u>, this is a <u>necessary measure in a commercial dispute</u>.** Because we believe the TEAM machine has been fighting dirty, abusing the online discussion and end-running the court.
> **It could very well be that some of these sites truly are spontaneous**, just angry citizens independently voicing their opinions without direction from anyone else. **We have no problem with those folks. We don't want their money, we regret wasting their time and *we will even offer to reimburse their costs*. (Exhibit A.)**

This "catch-and-release" policy is unquestionably the most cynical, brazen, pernicious abuse of process in any case reviewed by this writer on this subject to date. Knowingly dragging potentially dozens of innocent private citizens through the courts for the purpose of what? A

fishing expedition for evidence against its arch-enemies Woodward & Brady? This is outrageous and should not be countenanced in a civilized, democratic republic like ours!

As stated in Defendants' motion, Quixtar's complaint should be dismissed, Quixtar's subpoenas should be suppressed, and a protective order issued for the following reasons:

I. Quixtar's complaint is barred on the basis of collateral estoppel; and further should be dismissed due to Quixtar's blatant forum shopping;

II. Quixtar's complaint fails to state a claim upon which relief can be granted; and

III. The readily available evidence is undisputed, and shows that Defendants' are entitled to judgment as a matter of law.

Since Quixtar has totally failed to satisfy its burden of proof before obtaining the personal identification information of the John Doe defendants, its subpoenas for such records should be suppressed under the US and Michigan Constitutions, and a Protective Order should be entered prohibiting Plaintiff from obtaining such personal identification information of any John Doe defendants. In the alternative, Defendants request an evidentiary hearing into the allegations to determine whether there is sufficient evidence to support its complaint.

WHEREFORE, John Doe Defendants 1-5, 8, 9, 12-18, & 21, request this Court to grant their motion and enter an Order Quashing Plaintiff's Subpoenas, and further enter a protective Order prohibiting Plaintiff from using any means, including civil process, to obtain the personal identification information of any John Doe defendants, until further Order of this Court after a hearing on reasonable notice to all John Doe defendants, and opportunity of the defendants to be heard; in the alternative, Defendants request an evidentiary hearing.

Respectfully submitted,

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Attorney: John Does 1-5, 8, 9, 12-18, & 21
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