

COMMON PLEAS COURT  
CUYAHOGA COUNTY, OHIO

POWERMARK HOMES, *et al.*,

Plaintiffs,

v.

JOHN DOE, *et al.*,

Defendants.

Case No. CV 07-625465

MEMORANDUM IN SUPPORT OF MOTION TO QUASH  
SUBPOENA AND MOTION TO QUASH COMPLAINT<sup>1</sup>

Defendant John Doe operates a website that provides information to the public about plaintiff homebuilding company Powermark Homes. *See* Compl. Exh. A (printout of portions of website). The website contains links to the online court dockets of lawsuits in which the company has been a defendant and asks the reader: “Do you really want to do business with this Ohio Home Builder?” *Id.* A pop-up window informs visitors that the site is not affiliated with Powermark Homes, Inc. *See* Exh. 1 (printout of pop-up window).

Plaintiffs filed suit for defamation and invasion of privacy against the website’s anonymous operator, named in the complaint as “John Doe,” and Domains by Proxy, the company responsible for registering Doe’s website domain name. Based on this complaint, plaintiffs sent a subpoena to Domains by Proxy demanding Doe’s

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<sup>1</sup> On June 11, 2007, Doe filed a motion titled “Motion to Quash Complaint.” In his motion, Doe contended that his website did not defame, disparage, or invade the privacy of plaintiffs and is protected by the First Amendment. *See* Pl.’s Mot. to Quash Compl. As explained in the accompanying motion to file this memorandum, the title and substance of Doe’s motion identifies it as the equivalent of a motion to dismiss under Rule 12(b)(6).

identifying information. *See* Br. in Supp. of Pls.’ Am. Mot. for TRO (“Am. TRO Mot.”), Exh. H (subpoena). Plaintiffs also sent Doe’s Internet service provider GoDaddy a notice of claimed infringement pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, causing GoDaddy to take the site offline. *See* Exh. 2 (notice of claimed infringement). The website remains unavailable.

A growing consensus of courts have recognized that the First Amendment right to engage in anonymous speech requires that, prior to allowing discovery into the identity of an anonymous Internet critic, plaintiffs make a preliminary showing that their claims have merit. Plaintiffs in this case have made no such showing. Although they claim generically that Doe’s website—the majority of which is made up of links to public records—is “false and defamatory,” they have not identified any specific defamatory statements that they claim to be false. Indeed, it is clear from plaintiffs’ filings that their real concern is not that the site is false, but that it criticizes plaintiffs and appears in Google search results. Plaintiffs cannot complain, however, that a website appears on the Internet or in search results as long as that website is truthful.

Plaintiffs’ subpoena threatens to infringe Doe’s First Amendment right to engage in truthful, anonymous communication, and, for this reason, the subpoena should be quashed. Moreover, because plaintiffs have not alleged and cannot show that any content on Doe’s website is false and defamatory, the case should be dismissed.

## BACKGROUND

Plaintiff Powermark Homes is “a large, well-established construction company with over \$6 Million annual sales.” Am. TRO Mot. at 2. Defendant John Doe is the anonymous creator and owner of a website titled “Powermark Homes Alert.” Compl ¶ 1. Doe’s website does not contain any advertisements or products for sale and is entirely noncommercial in nature. *See id.* Exh. A. Immediately upon accessing the site, readers are informed in a pop-up window that the site is “an unofficial website” that “is not sponsored by, affiliated with, or in any way related to Powermark Homes, Inc.” *See* Exh. 1. The pop-up window provides a link to the official site for Powermark Homes. *Id.*

The bulk of Doe’s website is made up of links to the Internet-based dockets of Ohio courts, organized by county, showing that plaintiffs Powermark Homes, Mark Powers, and Lisa Powers have been defendants in numerous lawsuits. *See* Def.’s Mot. to Quash Compl. Exh. B (complete printout of website). The front page of the site states, in front of a picture of Mark and Lisa Powers obtained from the Powermark Homes company website, the words “The Truth Exposed” and asks the reader: “Do you really want to do business with this Ohio Home Builder?” *Id.* In a section titled “About the Owners,” the site links to state records of incorporation for five businesses owned by either Mark or Lisa Powers. *Id.* In a section called “The Truth Exposed?” the site displays Google search results in which the record for Powermark Homes indicates that the company’s website had been shut down for non-payment of web-hosting bills. *Id.*

The “About Us” section of Doe’s website states that its “objective is to alert consumers and to demonstrate the value of utilizing public records when doing research on any business or individual.” *Id.* It further states:

All of the information related to Powermark Homes, Inc. or its owners has been obtained from public records and we believe this information will be a valuable resource to assist interested consumers in making an informed decision before selecting and doing business with any company.

We will not make comment on or answer any questions about Powermark Homes, Inc. and its owners because all consumers must make their own conclusions about the reliability and truthfulness of information provided on any website they visit.

*Id.*

Plaintiffs filed suit against the site’s operator as “John Doe,” asserting claims of defamation, misappropriation, false-light publicity, and disparagement, and moved for a temporary restraining order “requiring Defendants to remove the false and defamatory website.” Pls.’ Mot. for TRO. Plaintiffs also subpoenaed Domains by Proxy for Doe’s identifying information. *See* Am. TRO Mot. Exh. H. After Domains by Proxy notified Doe that he needed to file an objection with this Court to block release of his identity, *see* Exh. 3 (email from Domains by Proxy to John Doe), Doe filed a pro se, anonymous answer, a “Motion to Quash Complaint,” a “Motion to Quash Plaintiffs’ Temporary Order,” and, later, a motion to quash the subpoena.

Although they have not asserted any claims of copyright infringement in this case, plaintiffs also sent a notice of claimed infringement to Doe’s Internet service provider GoDaddy pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, claiming that the photograph of Mark and Lisa Powers on the site infringed

their copyright in the photograph. *See* Exh. 2. The image, which is also displayed on plaintiffs' own website, appears to have been taken from the front cover of a trade magazine. *See* Exh. 4 (printout of the official Powermark Homes website). As a result of plaintiffs' claim of infringement, GoDaddy removed Doe's website from the Internet. The site remains unavailable.

Plaintiffs and their counsel made no attempt to notify Doe of the case against him, the pending subpoena, or the notice of claimed infringement, even though an email link is displayed on Doe's website and plaintiffs' counsel, using a pseudonym, had previously used the email link to contact Doe. *See* Exh. 5 (email from Bruce McClain, using the pseudonym Roman Crea, to John Doe). Doe learned of the case against him only because Domains by Proxy notified him of the pending subpoena and because his website later suddenly went offline.

## **ARGUMENT**

Prior to obtaining the identity of an anonymous defendant, courts require plaintiffs to make a preliminary showing of actual evidence on each element of their claims sufficient to withstand a motion for summary judgment. Plaintiffs in this case fail to meet that burden, or even to state a claim on which relief could be granted. The subpoena to Domains by Proxy should therefore be quashed and the case should be dismissed.

### **I. The First Amendment Protects Anonymous Internet Speech.**

The First Amendment protects the right to anonymous speech. *See Watchtower Bible and Tract Soc'y. of N.Y. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999);

*McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 341-43 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960); *McMann v. Doe*, 460 F. Supp. 2d 259, 266 (D. Mass. 2006). Anonymous or pseudonymous writings have played an important role over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court wrote in *McIntyre*:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

. . .

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 U.S. at 341-42, 356.

This right to anonymous speech is fully applicable to speech on the Internet. *McMann*, 460 F. Supp. at 266. The U.S. Supreme Court has treated the Internet as a forum of preeminent importance because it provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997). "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas," and therefore "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *McMann*, 460 F. Supp. 2d at 266 n.35 (internal quotation omitted). In

particular, courts have granted First Amendment protection to “gripe sites”—noncommercial websites, such as the website at issue here, set up solely for the purpose of criticizing a particular person or company. *See, e.g., Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (holding that the First Amendment protected the gripe site “shopsatwillowbend.com” from a claim by the Shops at Willow Bend shopping mall); *McMann*, 460 F. Supp. 2d at 266 (accord[ing] First Amendment protection to the operator of the gripe site “paulmcmann.com” against defamation and privacy claims by homebuilder Paul McMann).

## **II. Plaintiffs Must Make a Preliminary Showing Prior to Obtaining Doe’s Identity.**

A court order, even if granted for a private party, is a form of state action and is thus subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). An order to compel production of a person’s identity in a situation that threatens the exercise of fundamental rights “is subject to the closest scrutiny.” *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, “even though unintended, may inevitably follow from varied forms of governmental action,” such as compelling the production of names. *NAACP*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-63; *Bates*, 361 U.S. at 524.

A growing consensus of courts has recognized that civil subpoenas seeking information regarding anonymous speakers raise First Amendment concerns. *See, e.g., McMann*, 460 F. Supp. at 266. The Northern District of Ohio in *SPX Corp. v.*

*Doe* recognized the First Amendment issues at stake with such a subpoena and the need to “balanc[e] the First Amendment right to speak anonymously with the rights of a litigant to obtain relevant discovery and prove its claims or defenses.” No. 02-cv-919, slip op. at 4 (N.D. Ohio July 1, 2002) (unpublished opinion, attached as Exh. 6). As Judge Manos noted in *SPX Corp.*, “[i]f disclosure could be achieved [too] readily, then the mere filing of a lawsuit [could] be used as a means to intimidate or dissuade people from making negative comments about . . . companies.” *Id.*; see also *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“If Internet users could be stripped of [their] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.”).

The court in *SPX Corp.* was not required to delineate a precise standard to govern the identification of anonymous speakers because the defendant in that case filed and ultimately prevailed on a motion to dismiss. *SPX Corp.*, No. 02-cv-919, at 5; 253 F. Supp. 2d 974 (N.D. Ohio 2003) (granting motion to dismiss). Other courts, however, have enunciated more definite standards. The first appellate decision in the country remains the leading case: *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. *Id.* at 140. The court set out a five-part standard for evaluating subpoenas that seek to identify anonymous Internet speakers, under which the court should: (1) provide notice to the potential defendant and an opportunity for him to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to

ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of its claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous in light of the strength of the plaintiff's evidence of wrongdoing. *Id.* at 141-42.

Numerous reported decisions from federal and state courts have adopted the *Dendrite* test or a variation of the test. In *Doe v. Cahill*, the Delaware Supreme Court ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters only if he could put forward sufficient evidence to establish a prima facie case on all elements of a defamation claim within his control, including evidence that the statements were false. 884 A.2d 451, 460, 461 (Del. 2005). Under the *Cahill* standard, plaintiffs should only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id.* at 457. The District of Arizona in *Best Western Int'l, Inc. v. Doe* applied *Cahill's* summary-judgment test in refusing to enforce a subpoena to identify the authors of postings criticizing the Best Western motel chain where the plaintiff did not present any evidence that the Doe defendants had written anything false. No. 06-cv-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006). In *McMann v. Doe*, the court relied on *Cahill* and *Best Western* in rejecting a lawsuit by a homebuilder against the anonymous operator of another critical website. 460 F. Supp. 2d 259. The court denied a motion for leave to subpoena Domains by Proxy and rejected defamation and privacy claims nearly identical to plaintiffs'

claims in this case, holding that the plaintiff had failed to state a claim for any cause of action that justified violating the defendant's First Amendment right to speak anonymously. *Id.* at 268.<sup>2</sup>

Although other courts have adopted slightly different tests, each has conducted the essential step of weighing the plaintiff's interest in identifying the speakers who allegedly violated its rights against the interests implicated by the First Amendment right to anonymity, thereby ensuring that First Amendment rights are not trammelled unnecessarily. Thus, courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing a speaker's anonymity.<sup>3</sup>

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<sup>2</sup> The court in *McMann* expressed some doubt about how well a summary-judgment test would work in a suit against a public figure, where a plaintiff might not be able to produce evidence of actual malice. 460 F. Supp. 2d at 267. Based on this same concern, several courts in Internet anonymity cases, including *Cahill*, have held that the requirement of showing a prima facie claim for defamation does not extend to the actual malice element. *See Cahill*, 884 A.2d at 464. For purposes of this motion, Doe does not claim that any of the plaintiffs are public figures, so this potential problem would have no effect on the application of the test here. Ultimately, the court in *McMann* did not need to decide whether to adopt the summary-judgment test because it held that the plaintiff's complaint did not even state a claim on which relief could be granted and thus would fail *any* test. *McMann*, 460 F. Supp. 2d at 268.

<sup>3</sup> *See, e.g., Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Alvis Coatings v. Doe*, No. 3L94 CV 374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (Pa. 2003).

### III. Plaintiffs Have Failed to Make the Showing Required to Obtain a Subpoena.

#### A. Plaintiffs Have Not Specifically Identified the Allegedly Defamatory Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff has a valid reason for piercing a speaker's anonymity. *Dendrite*, 342 N.J. Super. at 141. As an initial step, courts require plaintiffs to quote the exact statements by each anonymous speaker that allegedly violated their rights. *Id.*

In this case, plaintiffs do not identify a single allegedly false and defamatory statement from Doe's website. Instead, they rely only on vague and generalized claims that "[t]he statements, allegations, pictures and other representations contained in the false Internet site are in many or most instances false and misleading." Compl. ¶ 5. Such conclusory allegations are insufficient to justify taking the step of revealing Doe's identity and thereby irrevocably infringing his right to engage in anonymous speech. *See Best Western*, 2006 WL 2091695, at \*5 (holding that a complaint for defamation, although technically stating a claim for relief, did not include any alleged defamatory statements and therefore was inadequate to justify ordering the release of an anonymous critic's identity); *Cahill*, 884 A.2d at 458 (noting that allegations that are "vague or lacking in detail" may conceal "silly or even trivial libel claims"). Moreover, without the plaintiffs' specifying which statements are allegedly false, Doe has no opportunity to respond by demonstrating that the statements are, in fact, true.

**B. A Review of the Facial Validity of Plaintiffs' Claims Reveals They Are Meritless.**

The court should next review each claim asserted by plaintiffs to determine whether it is facially actionable. *Dendrite*, 342 N.J. Super. at 141. If the complaint shows that the plaintiffs are not entitled to any relief, no purpose would be served by allowing discovery into the identity of an anonymous speaker. In this case, plaintiffs' claims are meritless on their face.

**1. Defamation**

A claim for defamation under Ohio law requires a plaintiff to prove “falsity, defamation, publication, injury, and fault.” *State ex rel. Sellers v. Gerken*, 72 Ohio St. 3d 115, 117, 647 N.E.2d 807, 810 (Ohio 1995). Here, plaintiffs cannot satisfy even the first element—that of falsity. Truth is an absolute defense to defamation, *Krems v. Univ. Hosps. of Cleveland*, 133 Ohio App. 3d 6, 12, 726 N.E.2d 1016, 1020 (8th Dist. 1999), and plaintiffs have not claimed that anything appearing on Doe’s website is false. Moreover, the majority of the website is devoted to links to public court dockets of cases in which Powermark Homes, Mark Powers, or Lisa Powers were defendants. *See* Def.’s Mot. to Quash Compl. Exh. B. Statements reporting or summarizing official records are privileged and immune from claims for defamation as long as they are “substantially accurate.” *Oney v. Allen*, 39 Ohio St. 3d 103, 106, 529 N.E.2d 471, 473 (Ohio 1988). Plaintiffs have not alleged that Doe’s representation of the court dockets is in any way inaccurate.

The remaining statements on Doe’s website are not factual or provably true or false. To be susceptible to defamatory meaning, a statement must have “precise

meaning” that “give[s] rise to clear factual implications.” *Wampler v. Higgins*, 93 Ohio St. 3d 111, 127-128, 752 N.E.2d 962, 978 (Ohio 2001). “Ohio does not recognize libel through implied statements.” *Krems*, 133 Ohio App. 3d at 12, 726 N.E.2d at 1021. Thus, “statements that are ‘loosely definable’ or ‘variously interpretable’ cannot in most contexts support an action for defamation.” *Wampler*, 93 Ohio St. 3d at 128, 752 N.E.2d at 978 (internal quotation omitted). Statements on Doe’s website like “The Truth Exposed” do not convey any specific facts susceptible to defamatory meaning and thus cannot be defamatory. Moreover, the rhetorical questions on Doe’s site like “Do you really want to do business with this Ohio Home Builder?” and “Can they weather this storm?” state no facts and are inherently unprovable. *See Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 124, 413 N.E.2d 1187, 1194 (Ohio 1980) (holding that a rhetorical question could “neither be true nor false”). At most, these statements are opinion that is protected by the First Amendment of the U.S. Constitution or by the “separate and independent guarantee of protection for opinion” provided by Article I, Section 11 of the Ohio Constitution. *Wampler*, 93 Ohio St. 3d at 112, 752 N.E.2d at 965.<sup>4</sup>

In *McMann v. Doe*, the District of Massachusetts rejected similar claims by another homebuilder against an Internet critic. 460 F. Supp. 2d 259. The anonymous speaker in that case asserted on his website that the plaintiff had “turned

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<sup>4</sup> *See also Ollman v. Evans*, 750 F.2d 970, 989 (D.C. Cir. 1984) (holding that a rhetorical question about a professor—“Does he intend to use the classroom for indoctrination?”—did not affirmatively state that the professor was indoctrinating his students); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (holding that a rhetorical question was incapable of being found true or false).

lives upside down” and that readers should “be afraid, be very afraid.” *Id.* at 262. The court held that such “bland, vague, and subjective statements” are unverifiable and do not constitute defamation. *Id.* at 270. The statements at issue in this case are, if anything, even more indefinite than those at issue in *McMann*. Indeed, it is impossible to imagine what sort of evidence could be submitted at a trial to prove the truth or falsity of a statement like “Do you really want to do business with this Ohio Home Builder?” *See Wampler*, 93 Ohio St. 3d at 129, 752 N.E.2d at 979 (holding that, to be defamatory, a statement must be “subject to proof or disproof upon the application of facts to an accepted legal standard”). “An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits of no method of verification.” *Id.* (internal quotation omitted).<sup>5</sup>

The only *specific* fact that plaintiffs claim to be false is a statement that appears nowhere on Doe’s website. Plaintiffs assert that the site “characteriz[es] the plaintiff Lisa Powers falsely as an owner of Powermark Homes, Inc.” Compl. ¶ 12. Doe’s website, however, never makes that assertion. As is apparent from plaintiffs’

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<sup>5</sup> In *Wampler*, the Ohio Supreme Court held that a letter accusing a landlord of being a “ruthless speculator” and charging “exorbitant rent,” although “plainly pejorative in tone,” was “inherently imprecise and subject to myriad subjective interpretations.” 93 Ohio St. 3d at 128, 752 N.E.2d at 979; *see also Vail v. The Plain Dealer Publ’g Co.*, 72 Ohio St. 3d 279, 283, 649 N.E.2d 182, 186 (Ohio 1995) (holding that a columnist’s accusations that a candidate engaged in an “anti-homosexual diatribe” and fostered homophobia “can hardly be defined with crystal clarity,” and were “value-laden” and “subjective”); *Rothschild v. Humility of Mary Health Partners*, 163 Ohio App. 3d 751, 760, 840 N.E.2d 258, 265 (7th Dist. 2005) (holding that the statement that the plaintiff was “lazy” was “inherently subjective and open to many interpretations”).

own exhibits, Doe stated (truthfully) that Lisa Powers was a defendant in a lawsuit along with her husband Mark Powers. *Id.*, Exh A. Moreover, in the section of the website called “About the Owners,” Doe states that Mark and Lisa Powers “between them” own five corporations, a fact obtained from a search of the state’s database of corporations. *Id.* Near the bottom of that web page, Doe refers to “owners Mark & Lisa Powers,” but does not specify which company which person owns. Nowhere on the website does Doe state that Lisa Powers is an owner of Powermark Homes, and plaintiffs do not dispute that she does own other businesses.

Even assuming, however, that Doe *had* made or implied such a fact, the assertion that Lisa Powers is the owner of a business would not harm her reputation and thus could not be defamatory. *See Gupta v. The Lima News*, 139 Ohio App. 3d 538, 546, 744 N.E.2d 1207, 1212 (3d Dist. 2000) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” (internal quotation omitted)). Indeed, plaintiffs’ own website prominently displays the names and photographs of both Mark and Lisa Powers above the caption “Powermark Homes, Inc.,” which implies that she is one of the company’s owners. *See Exh. 4.* Assuming this implication is wrong, any hypothetical defamatory meaning implied by Doe’s website is equally communicated by plaintiffs’ own site.<sup>6</sup>

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<sup>6</sup> Another portion of Doe’s website shows a screenshot of Google search results demonstrating that plaintiffs’ website was shut down for non-payment of hosting fees. Plaintiffs do not assert that the Google search result is erroneous.

## 2. Disparagement

Plaintiffs' claim for disparagement is a restatement of their claim for defamation and fails for the same reasons. Disparagement claims are subject to the same constitutional privileges as defamation. *See A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 14, 651 N.E.2d 1283, 1294 (Ohio 1995). Because everything on Doe's website is true or, at most, unprovable opinion, the site cannot give rise to a claim for disparagement. Moreover, claims for disparagement are governed by the Ohio Deceptive Trade Practices Act, which provides that "[a] person engages in a deceptive trade practice when, *in the course of the person's business, vocation, or occupation*, the person ... [d]isparages the goods, services, or business of another by false representation of fact." Ohio Rev. Code Ann. § 4165.02(A)(10) (emphasis added). Here, Doe's website has no advertisements, sells no products, and is completely noncommercial in nature. Thus, Doe cannot be said to have disparaged plaintiffs "in the course of [his] business, vocation, or occupation."

## 3. Invasion of Privacy (Misappropriation)

Plaintiffs assert that the use of their photograph and names on Doe's website constitutes misappropriation. Ohio has defined the tort of misappropriation in accordance with the Restatement of Torts, which applies when a defendant has "appropriate[d] to his own use or benefit the name or likeness of another." *Zacchini v. Scripps-Howard Broad. Co.*, 47 Ohio St. 2d 224, 230 n.4, 351 N.E.2d 454, 458 n.4 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977) (quoting Restatement (Second) of Torts § 652C). The tort of misappropriation, however, does not allow plain-

tiffs to prohibit others from mentioning their names or displaying their likenesses.

In *Zacchini*, the Supreme Court of Ohio quoted the Restatement with approval:

The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation.

*Id.*; see also *Vinci v. Am. Can Co.*, 69 Ohio App. 3d 727, 729, 591 N.E.2d 793, 794

(8th Dist. 1990) (holding that the name and likeness of an Olympic athlete printed on a Dixie Cup was “purely informational” and not misappropriation where “there was no implication that the athlete[] used, supported, or promoted the product”).

Plaintiffs thus have no legal right to prohibit Doe from referring to them by name.

The court in *McMann v. Doe* rejected an identical claim made by the plaintiff homebuilder in that case. 460 F. Supp. 259. The court noted that the plaintiff's photograph and information about his business dealings did not intrude on his privacy. *Id.* at 268. It further held that the plaintiff's identity was not misappropriated because, “[b]y posting [plaintiff's] photograph on his webpage, [the defendant] did not attempt to employ the photo for commercial value, but rather as part of a declaration of his opinion of [the plaintiff].” *Id.* Likewise, Doe in this case obtained the picture of plaintiffs from their own publicly available website, see Exh. 4, and, like the anonymous speaker in *McMann*, used the photograph only for purposes of running a critical website. Doe hosts no advertising on the site and sells no products from it, nor does he derive any other benefit from use of plaintiffs' identities. Therefore, he

has not misappropriated those identities. Moreover, any interpretation of the tort of misappropriation that would prohibit the truthful use of plaintiffs' names for the purpose of criticism would run headlong into the First Amendment. *See Taubman*, 319 F.3d at 778; *McMann*, 460 F. Supp. 2d at 266; *see also Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005) (holding that First Amendment concerns limited application of federal trademark law to the website fallwell.com, a gripe site about the Reverend Jerry Falwell); *Ficker v. Tuohy*, 305 F. Supp. 2d 569 (D. Md. 2004) (holding that that a congressional candidate's website robinficker.com was protected by the First Amendment against claims by opposing candidate Robin Ficker); *Crown Pontiac, Inc. v. Ballock*, 287 F. Supp. 2d 1256 (N.D. Ala. 2003) (holding that the gripe site crownpontiacnissan.com was protected against claims by the car dealer Crown Pontiac Nissan).

#### **4. Invasion of Privacy (False-Light Publicity)**

Like defamation, the tort of false-light publicity is subject to First Amendment limitations and requires plaintiffs to show that the complained-of statements are false. *See Welling v. Weinfeld*, 113 Ohio St. 3d 464, 866 N.E.2d 1051 (Ohio 2007). Thus, plaintiffs' false-light publicity claim fails for the same reason as their defamation claim. Plaintiffs allege that Doe characterizes Lisa Powers in a false light as an owner of Powermark Homes. Compl. ¶ 12. As already explained, however, Doe never made that assertion and, in any case, the statement that Lisa Powers is an owner of the business is not the sort of statement that would be "highly offensive to a reasonable person," as required by the tort of false-light publicity. *Id.*

### C. Plaintiffs Have Provided No Evidentiary Basis for Their Claims.

Identification of an otherwise anonymous speaker is itself a major form of relief because the defendant may then be subjected to harassment, economic retaliation, or other forms of retribution. For this reason, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence to show a realistic chance of winning a lawsuit against that Doe defendant. *Dendrite*, 342 N.J. Super. at 141. A plaintiff should be required to put forth enough evidence to meet a summary-judgment standard by creating genuine issues of material fact on all issues in the case that are within its control. *Cahill*, 884 A.2d at 457. This requirement prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. *See Best Western*, 2006 WL 2091695, at \*5; *Cahill*, 884 A.2d at 458.

The evidence presented by plaintiffs in this case highlights the deficiency of their showing. Plaintiffs submitted affidavits by both Mark and Lisa Powers, but these affidavits state only the vague legal conclusion that the "website is false and defamatory *per se*." *See* Pls.' Affs. Plaintiffs do not provide any evidence that Lisa Powers is not an owner of Powermark Homes or that anything else on the website is false. Moreover, plaintiffs allege that they have suffered damages from Doe's website, but have offered no evidence to back up this allegation. As in *SPX Corp.*, plaintiffs' assertions of damages are made "only in the most general and conclusory sense." 253 F. Supp. 2d at 982 n.2. In *Dendrite*, it was the plaintiff's failure to present evidence of injury, which was an element of the New Jersey cause of action for libel, that barred discovery. *Dendrite*, 342 N.J. Super. at 154. Similarly, injury is an

element of a defamation claim in Ohio, *Gerken*, 72 Ohio St. 3d at 117, 647 N.E.2d at 810, and plaintiffs' claims therefore fail here for the same reason they failed in *Dendrite*. Although plaintiffs also request injunctive relief, including shutting down Doe's entire website, these requests for relief would be a prior restraint on speech that would violate the First Amendment. *See New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-25 (6th Cir. 1996) (noting the "heavy presumption" against prior restraints on speech). Thus, plaintiffs have not presented evidence that they are entitled to *any* of their claims for relief.

**D. The Balance of Equities Strongly Favors Doe.**

In *Dendrite*, the court also required a balancing of the defendant's First Amendment right of anonymous free speech against the strength of plaintiffs' prima facie case and the necessity for the disclosure of the anonymous defendant's identity. 342 N.J. Super. at 141-42. Because of the weaknesses of plaintiffs' claims and the importance of the First Amendment rights involved, the balancing process in this case strongly favors Doe. It is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Moreover, a refusal to quash plaintiffs' subpoena for Doe's identity would irreparably injure Doe because, once he has lost his anonymity, he can never get it back. On the other hand, no unfairness would result from quashing the subpoena because plaintiffs would still have the opportunity to amend their complaint and provide more evidence if they are able to do so.

**E. Plaintiffs Failed to Provide Reasonable Notice of the Threat to Doe's Anonymity.**

When asked to subpoena anonymous Internet speakers, a court should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time so that the defendants have time to retain counsel. *Cahill*, 884 A.2d at 461. The purpose of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable can be served only by allowing defendants enough time to respond to plaintiff's showing of the basis for disclosure—ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, plaintiffs made no effort to notify Doe of the subpoena to give him a chance to respond, even though an email link is displayed on Doe's website and plaintiffs' counsel had previously used the link to send a pseudonymous email to Doe. *See* Exh. 5. Although Doe did ultimately learn of the lawsuit, plaintiffs' actions underscore the importance of the notice rule in general. As this case demonstrates, plaintiffs cannot be counted on to provide reasonable notice to anonymous defendants, even when such notice would be extremely easy to give. Many John Doe targets of subpoenas may not know about a subpoena until it is too late or may be given an inadequate time in which to obtain an attorney and file a response. It is thus critical that the court itself ensure that the First Amendment rights of anonymous speakers are protected.

## CONCLUSION

The subpoena should be quashed, and the complaint should be dismissed.

Respectfully submitted,

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July 10, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2007, I served the foregoing MOTION FOR LEAVE TO FILE MEMORANDUM OF LAW and accompanying memorandum on all parties by causing a true and correct copy to be sent by U.S. Mail, postage pre-paid, to counsel at each of the following addresses:

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