Cause No. 07-07934-H

IN RE	)	IN THE DISTRICT COURT
PETITION OF MP	)	
REQUESTING DEPOSITION	)	DALLAS COUNTY TEXAS
OF CORPORATE REPRESENTATIVE	)	
OF GOOGLE, INC.	)	160TH JUDICIAL DISTRICT

BRIEF OF PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS AS AMICI CURIAE

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MISCELLANEOUS

This case involves a blog that criticizes the operation of an elite country club near San Diego, California. The blog is hosted on the servers of Google, an Internet Service Provider located in northern California. Invoking the authority of a court nearly fourteen hundred miles away, in Dallas, the target of the criticism uses Rule 202 of the Texas Rules of Civil Procedure to seek to compel Google to identify the host of the blog and the authors of the comments posted there, supposedly to permit her to "request that the defamatory conduct cease" or to sue the speakers. However, because the First Amendment guarantees the right to speak anonymously unless that right is abused, because there is neither allegation nor evidence that the speakers committed any legal wrong, and because it is not even clear that this Court would have personal jurisdiction over the potential defendants, the subpoena should be quashed.

INTEREST OF AMICI CURIAE

Public Citizen is a public interest organization based in Washington, D.C., which has approximately 100,000 members, approximately 3500 of them in Texas. Along with its efforts to encourage participation in public life, Public Citizen has brought and defended numerous cases involving the First Amendment rights of citizens who do participate, with a particular emphasis over the past eight years on the right to speak anonymously on the Internet. Public Citizen attorneys have represented Doe defendants or appeared as amicus curiae in dozens of cases, in states across the country, involving the standard to be applied to decide whether to compel the identification of anonymous speakers based on allegations that their speech was wrongful, including the most recent decision on this subject, issued earlier this week. *Mobilisa v. Doe*, — P.3d —, 2007 WL 4167007 (Ariz. App. Div. 1, Nov. 27, 2007).[1]

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[1] *E.g.,Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Fitch v. Doe*, 869 A.2d 722, 2005 ME 39 (Me. 2005); *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Greenbaum v. Google*, — N.Y.S.2d—, 2007 WL 3197518 (N.Y. Sup.

Amicus American Civil Liberties Union Foundation of Texas ("ACLU - Texas") is a public interest organization with approximately 16,000 members in Texas and is an affiliate of the American Civil Liberties Union, which has more than 400,000 members nationally. One of the primary concerns of the ACLU is promoting and protecting First Amendment rights. Recently there has been a spate of Rule 202 deposition requests filed against website or chat-room providers seeking the identity of persons alleged to have published defamatory comments about large and powerful corporations or rich and influential people. The goal of these efforts, if they are successful, is defamation lawsuits against usually impecunious individuals who are punished for expressing their opinions by the burden of litigation expenses.

Recently the ACLU - Texas has been involved in two such Rule 202 lawsuits. In *BNSF Railway Co.*, No. 96-224704-07, Tarrant County, ACLU - Texas Vice President-Legal David Broiles is local counsel in opposing a Rule 202 petition to depose Network 54, which hosts a message board on the internet. ACLU-Texas represented the respondent website provider in *In re Sienna/Johnson Development*, No. 05-CV-144185, 240th Judicial District, Fort Bend County, and in two mandamus proceedings in the Houston Courts of Appeals and one mandamus proceeding in the Texas Supreme Court arising out of the District Court's orders.

N.Y, Cy., Oct. 23, 2007); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen Cy.); *Northwest Airlines v. Teamsters Local 2000*, No. 00-08DWF/AJB (D. Minn.); *Hollis-Eden Pharmaceutical Corp. v. Doe*, Case No. GIC 759462 (Cal. Super. San Diego Cy.); *iXL Enterprises v. Doe, No.* 2000CV30567 (Ga. Super. Fulton Cy.); *Thomas & Betts v. John Does 1 to 50*, Case No. GIC 748128 (Cal. Super. San Diego Cy.); *Hritz v. Doe,* C-1-00-835 (S.D. Ohio); *WRNN TV Associates v. Doe*, CV-00-0181990S (Conn. Super. Stamford); *In re Jimmie Cokinos*, No. B-172,785 (Tex. Dist. Ct., Jefferson Cy.); *Tendler v. Doe*, No. 1 06 cv 064507 (Cal. Super. Santa Clara Cy.); *Pilchesky v. Gatelli*, No. 2007-CV-1838 (Pa. Com. Pl. Lackawanna Cy., Oct. 10, 2007).

STATEMENT OF THE CASE

A. Factual Background

1. The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to read them. As the Supreme Court explained in *Reno v. ACLU,* 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." The Court held, therefore, that full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it, "[defendant] is free to shout 'Taubman Sucks!' from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [defendant] has a First Amendment right to express his opinion about Taubman." *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. Google's Blogspot gives individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, major companies, or other topics while leaving it open for visitors to post their own comments. The

individuals who post messages generally do so under a pseudonym – similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the message board at issue here will reveal, most people choose nicknames. These typically colorful monikers protect the writer's identity from those who disagree with him or her, and they encourage the uninhibited exchange of ideas and opinions. Indeed, every message board has regular posters who persistently complain about the company, others who persistently praise it, and others whose opinions vary between praise and criticism over time. Such exchanges are often very heated, and they are sometimes filled with invective and insult. Most, if not everything, that is said on message boards is taken with a grain of salt.

One aspect of a message board that makes it very different from almost any other form of published expression is that, because any member of the public can use a message board to express his point of view, a person who disagrees with something that is said on a message board for any reason – including the belief that a statement contains false or misleading information – can respond to those statements immediately at no cost, and that response will have the same prominence as the offending message. A message board is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong. And, because many people regularly revisit the message board about a particular company, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas,

rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

2. The blog in question here is devoted to criticism of the petitioner's influence over a country club located in Del Mar, California, which is near San Diego.[2] Both the postings by the blogger himself, and the anonymous comments posted by others, criticize petitioner "MP" for new club policies that, they say, work to the disadvantage of long-time members by making the club too available for use by non-members, effectively denying them the use for which they have paid. Other criticisms are more personally directed at petitioner for things she has done personally at the club.

B. Proceedings to Date

On August 2, 2007, MP filed this proceeding in Dallas County, Texas, contending that "derogatory statements" about her had been posted on "blogs hosted by Google," thus warranting discovery to identify posters on the blog so that MP could "request that such defamatory conduct cease" and/or to sue "the responsible individuals and/or entities." Although the petition did not identify the message boards, after this Court granted leave to pursue prelitigation discovery, petitioner served subpoenas seeking to identify the creator of a single blog, entitled "Del Mar Country Club Sucks," posted to the internet at dmccsucks.blogspot.com, as well as all persons who posted comments there. One of the three paragraphs of the petition was verified, but nothing in the petition alleged that the allegedly defamatory comments were false or caused any damages.

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[2]Although the petition identifies the blog only by its domain name "dmccsucks.blogspot.com," and the name of the country club is redacted in the copy of the blog attached to the amended petition, the subpoena to Google, which petitioner placed in the record in her opposition to the initial motion to quash, identified the subject of the blog as the Del Mar Country Club. Because the location of the country club is relevant to the motion to quash, insofar as it calls into question whether this Court would have jurisdiction of the threatened defamation action, we use the actual name of the club in these papers.

The petition did not identify any of the allegedly actionable statements, or even describe their gist, but subsequent briefing identified 3 allegedly actionable statements. Although the blog is about a country club in California, and is presumably directed to the members of that club, plaintiff alleges that venue is proper in this Court because plaintiff has a residence in Dallas. However, MP deprives the Court of any ability to verify that fact by refusing to provide the Court with her identity which, she claims, she is entitled to keep secret "to protect her privacy." Petitioner made no attempt to give notice of her petition, such as by posting a warning of her petition on the blog itself. Proceeding ex parte, petitioner obtained an order authorizing her to demand discovery from Google. Google, in turn, notified the operator of the blog that, unless she filed a motion to quash, Google would provide the requested discovery.[3]

The Doe who created the Google account and maintains the DMCCSucks blog moved to quash the subpoena, asserting that enforcement would breach the First Amendment right of both the blogger herself and of the anonymous commenters to speak anonymously. Following a hearing on that motion to quash, petitioner was given leave to file an amended petition to attempt to satisfy the requirements of the First Amendment. Petitioner then filed an amended petition, identifying three comments on the blog as examples of the defamation that she claims the right to try to stop, though litigation or otherwise, and identifying as well some additional torts that she claims are implicated by the allegedly defamatory comments. However, only two sentences of the amended petition were verified, and then only by Daniel Skinner, a lawyer in the firm representing petitioner. Although one of the verified sentences refers in passing to "the above referenced false and libelous statements," it is not clear how Skinner claims to have personal knowledge about whether specified statements

[3]It is our practice to refer generically to anonymous speakers in the female gender.

are true or false. Neither of the verified sentences asserted that the statements about petitioner caused any damage.

SUMMARY OF ARGUMENT

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. Similar cases across the country, and advice openly given by lawyers to potential clients,

demonstrate that access to identifying information to enable extrajudicial action may be the only reason for many such lawsuits. On the other hand, some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation. Petitioner here surely recognizes the value of anonymity, having filed her petition anonymously, using only initials.

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for vicious defamers to hide behind pseudonyms, nor too easy for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

This Court should embrace the developing consensus among those courts that have considered this question – including other Texas courts – by relying on the general rule that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Specifically, when faced with a demand for discovery to identify an anonymous speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her 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 her 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 her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part and may delay her quest for redress. However, everything that the plaintiff must do to meet this test, she must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff will be reasonably able to provide shortly after filing the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

Moreover, most cases of this kind primarily involve demands for monetary relief. Only in the rare case will a plaintiff have a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech. Accordingly, although applying this standard may delay service of the complaint, it will not ordinarily prejudice the plaintiff. On the other hand, the fact that after the defendant is identified, her right to speak anonymously has been irretrievably lost, counsels in favor of caution and hence in favor of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

On the record of this case, plaintiff has not presented evidence sufficient to warrant compelled identification of any of the Doe speakers. Petitioner's claim is not viable in part because this Court would not have personal jurisdiction of her claims – regardless of petitioner's claimed

residence in Dallas, she seeks to sue over statements made on a passive web site, hosted by a California ISP, about her management of a California country club, with no reference whatsoever to Texas. Many of the statements about which she claims the right to sue are non-actionable opinion, and even those claims that **are** about potentially actionable statements of fact lack any evidentiary support in the record. Because the test for breaching the right of anonymous speech has not been met here, the motion to quash should be granted.

THE FIRST AMENDMENT BARS ENFORCEMENT OF THE DISCOVERY SOUGHT.

A. The First Amendment Protects Against the Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003), *aff'g State v. Doe*, 61 S.W.3d 99, 103 (Tex. App. – Dallas 2001). These cases have celebrated the important role played by anonymous or pseudonymous writings 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 has stated:

> [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.
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> * * *

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

McIntyre, 514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of 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 US 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 1450 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F.Supp.2d 1261 (C.D. Cal. 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1092-1093 (W.D.Wash. 2001) (denying subpoena to identify third parties).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that

might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, the impact of a rule that makes it too easy to remove the cloak of anonymity is to deprive the marketplace of ideas of valuable contributions, and potentially to bring unnecessary harm to the speakers themselves.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech

and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id*. at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican*

Press, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1210, 1215 (S.D. Tex. 1991); *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470, 472 (Tex.App.–Houston [1st Dist.] 1987), no writ.

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of that 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." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D.Wash. 2001).

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In a number of recent cases, courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers.

The leading case is *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo! That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amici urge the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

Dendrite v. Doe, 775 A.2d at 760-761.[4]

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[4] *Dendrite* has received a favorable reception among commentators. *E.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U.L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001). Most recently, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech,* 82 Notre Dame L. Rev. 1537 (2007), argues for a standard that includes a balancing stage even after a summary judgment standard is met.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action (836 A.2d at 50):

> [C]ourt-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.

Since *Melvin* was decided, several Pennsylvania trial courts have recognized that disclosure turns on whether the plaintiff can produce sufficient evidence to carry her claim against a Doe defendant through summary judgment. In *Reunion Industries v. Doe*, 80 Pa. D.&C. 4th 449 (Com. Pl. Allegheny Cy. 2007), Judge Wettick, who also decided *Melvin*, reaffirmed his commitment to the summary judgment standard, and denied the requested discovery to support the plaintiff's defamation claim. In *Polito v. Doe*, 78 Pa. D. & C. 328 (Pa. Com. Pl. Lackawanna Cy. 2004), Judge Nealon held that the plaintiff had shown a prima facie case supporting her claim that insulting and pornographic emails sent directly to her AOL account, despite her efforts to change her address and avoid the messages, constituted harassment and stalking by communication under Pennsylvania law. And in *Klehr Harrison v. JPA Development*, 2006 WL 37020 (Pa. Com. Pl. Philadelphia Cy. Jan. 4, 2006), the court agreed with a law review article stating that a defendant "may oppose the discovery request by establishing that he or she is entitled to summary judgment. [This standard] would permit

discovery of a defendant's identity when the plaintiff had evidence supporting all elements of his claim . . .." *Id*. at *9. The Court had already issued a preliminary injunction based on a finding that the statements were defamatory and false, an order reversed on other grounds. *Klehr Harrison v. JPA Development*, Superior Court Docket No. 2095 EDA 2004 (December 21, 2005).[5]

In *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court became the third appellate court to establish standards for identifying anonymous Internet speakers who are accused of defamation, and as in *Dendrite* and *Melvin*, the Court required a substantial showing. In *Cahill*, the Delaware Superior Court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including that the statements are false. The Court rejected the final "balancing" stage of the *Dendrite* standard.

The most recent state appellate decision was issued in by the Arizona Court of Appeals in *Mobilisa v. Doe*, — P.3d —, 2007 WL 4167007 (Ariz. App. Div. 1, Nov. 26, 2007). That case was brought by a private company seeking to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court drew an analogy between an order requiring

[5]In its opposition to the original motion to quash, MP incorrectly cited *Klehr Harrison* as rejecting the requirement that evidence be presented to support a claimed right to subpoena the identity of alleged defamers.

identification of an anonymous speaker and a preliminary injunction against speech, and called for plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.[6]

No reported Texas cases have addressed the issue of discovery to identify anonymous Internet speakers. However, in response to several several motions to quash Texas subpoenas in this context, either the subpoena has been quashed by unpublished order, *In re Jimmie Cokinos*, Cause No. B-172-785 (60th Jud. Dist., Jefferson Cy., January 8, 2005) (copy attached); *Dynacq International, Inc. v. Yahoo Inc.*, No. GN2-02048 (53d Jud. Dist., Travis Cy.) (date unknown; order reported to undersigned by Doe's counsel), or the subpoena has been withdrawn in face of the motion to quash. *Citadel Security Software v. John Does 1-5*, Cause No. 416-00886-05 (416th Judicial Dist., Collin Cy.); *In re Protection One*, No. 02-11152-I (162d Jud. Dist., Dallas Cy.). *But see In re Sienna/Johnson Development*, No. 05-CV-144185 (240th Jud. Dist., Fort Bend Cy.), (associate judge ordered disclosure; appeal to district judge could not be heard until after the ordered disclosure; First and Fourteenth Courts of Appeals in Houston and Supreme Court denied mandamus petitions without addressing the merits).

MP cites *In re Maurer*, 15 S.W.3d 256 (Tex. App. – Houston 2000), mand. denied, for the proposition that the Texas courts generally "allow[] full discovery upon a showing of need, including ther investigation of potential defamation claims, even in the face of assertions of First Amendment rights," Mem. Opposing Motion to Quash, at 7 and n.27. However, *Maurer* is inapposite. In that case the target of discovery asserted only the First Amendment right of association, objecting the

[6] In *Fitch v. Doe*, 869 A.2d 722 (Me. 2005), the Maine Supreme Court recognized the general rule but did not address it because the First Amendment had not been raised below.

discovery into membership in a local reform group, the Citizens for Oversight Committee. Finding that the defamation plaintiff in that case had dropped his demand for the names of the committee, the court rejected a mandamus petition seeking to set aside an order requiring disclosure of the names of the persons who had supplied information and helped write an allegedly defamatory newspaper advertisement. Moreover, in *Maurer* there was an actual defamation claim which had, presumably, survived preliminary motions. Here, by contrast, the First Amendment right asserted is the right to speak anonymously, a right that was not at issue in *Maurer*, and MP has not pleaded a cause of action for libel but only asserts that she wants to "investigate" one so that she can stop with by private action or **possibly** file suit. Accordingly, *Maurer* is not good authority to oppose the motion to quash in this case.[7]

In addition to these state court decisions, numerous reported decisions from federal district courts adopt standards similar to either *Dendrite* or *Cahill*. In *Highfields Capital Mgmt. v. Doe*, 385

[7] The one appellate case that some have cited as pointing in a different direction is *Lassa v. Rongstad*, 294 Wis. 187, 718 N.W.2d 673 (2006), a non-Internet case in which a political candidate sued a political organization over a leaflet, written by several unidentified members, that denounced the candidate for her relationship with a recently indicted political leader. After the known defendant was sanctioned for lying under oath to avoid giving information identifying the other, anonymous authors, the parties settled the case on terms that allowed Rongstad to appeal. On appeal, he presented an argument, not made below, that the court should have considered his motion to dismiss the complaint before ruling on the pending discovery motions. A plurality opinion joined by only two of the four justices participating in that case stated that Wisconsin's detailed pleading requirement met the First Amendment concerns raised by the court in *Cahill*. However, one of the other justices concurred on other grounds but declined to reach the First Amendment issues; the fourth justice dissented on First Amendment grounds; and three justices disqualified themselves. The plurality opinion does not state Wisconsin law, however, because a majority of justices must join an opinion for it to "have any precedential value." *State ex rel. Ziervogel v. Washington Cy. Bd. of Adjustment,* 661 N.W.2d 884, 888 (Wisc. App. 2003); *Doe v. Archdiocese of Milwaukee*, 565 N.W.2d 94, 102 n.11 (Wis. 1997). Moreover, *Cahill* was decided after briefing was complete, and it is not clear that any party argued for the application of *Cahill*'s summary judgment standard, not to speak of *Dendrite*'s balancing standard.

F. Supp. 2d 969 (N.D. Cal. 2005), the court required first that the plaintiff "adduce competent evidence . . . address[ing] all of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts." *Id.* at 975. If the plaintiff makes that evidentiary showing, "the court [must] assess and compare the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant." *Id.* In *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), the court refused to enforce a subpoena to identify the authors of several postings by Best Western franchisees that criticized the Best Western motel chain, because the plaintiff had not presented any evidence of wrongdoing on the part of the Doe defendants. The court suggested that it would follow a five-factor test drawn from *Cahill*, *Dendrite* and other decisions. *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001), similarly expressed a preference for the *Dendrite* approach, requiring a showing of reasonable possibility or probability of success. In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the Court weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying itself that plaintiffs had produced evidence showing a prima facie case that defendants had posted online hundreds of copyrighted songs. And in *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit that explained how certain comments were false.

A similar approach was used in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect

of such discovery (*id.* at 578):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Accordingly, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.

Although each of these cases sets out a slightly different standard, each requires the courts to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

C. MP Has Not Followed The Steps Required Before Identification of John Doe Speakers May Be Ordered in This Case.

Courts should follow five steps in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because MP cannot meet these standards, she is not

entitled to have her subpoena enforced.

(1) Require Notice of the Threat to Anonymity and an Opportunity to Defend It.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief.) The Appellate Division specifically approved this requirement. 342 N.J.Super. at 141, 775 A2d at 760.

Here, MP did nothing to meet the notice requirement, even though she could easily have posted a statement to the blog warning that she was planning to ask this Court for an order authorizing discovery. Because the operator of the DMCCSucks blog has removed it from the Internet as a result of MP's threat of litigation, such notice is no longer possible. Moreover, although Google has provided notice directly to the operator of the blog, those who post comments to a Blogspot blog are not required to provide information that allows Google or the blog host to send them notice.[8]

[8]However, Google will have retained "IP numbers," information that at the very least show which ISP's they were using when they posted the comments. This information can be used to

(2) Demand Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that it does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated its rights. Indeed, like most states, Texas requires that defamatory words be set forth verbatim in a complaint for defamation. *Perkins v. Welch*, 57 S.W.2d 914, 915 (Tex. Civ. App. – San Antonio 1933), no writ; *see also Granada Biosciences v. Barrett*, 958 S.W.2d 215, 222 (Tex.App.– Amarillo 1997), pet. denied; *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979).

Here, MP has identified three specific statements that she claims are "examples" of the defamatory speech she seeks to investigate – one statement made by the operator of the dmccsucks blog (that MP "continues to break the bylaws"), and one statement made by each of two commenters (the second commenter, that MP "earned her membership [in the club] on her knees," and by the ninth commenter (that "a law suit is eminent [sic] [for] breach of fiduciary responsibility and apparently some fraud"). However, her subpoena seeks to identify the authors of all twelve commenters, even though she has not identified a single defamatory comment by ten of the commenters. No discovery should be permitted into the identities of the other ten commenters, for whom no allegedly defamatory statements have been identified.

(3) Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable.

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identify the ISP's to whom further subpoenas must be sent to determine the identity of the posters themselves. In some cases, IP numbers can be used to identify Internet users directly.

In a defamation case, for example, some statements may be too vague or insufficiently factual to be defamatory. Some statements may not be actionable because they are not "of and concerning" MP, which is a requirement under the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). Moreover, although MP apparently seeks to identify the creator of the blog on the theory that she is "responsible" for any defamatory statements posted to her blog, the federal Communications Decency Act, 47 U.S.C. § 230, immunizes a web site host from liability for any statements posted on his site by other persons. *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418-422 (1st Cir. 2007); *Barrett v. Rosenthal*, 146 P.3d 510, 514, 525 (Cal. 2006); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

Other statements may be non-actionable because they merely express opinion, which is excluded from the cause of action for defamation. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989); *Brewer v. Capital Cities/ABC*, 986 S.W.2d 636, 643 (Tex. App. – Ft. Worth 1998), no pet. For example, even assuming that the statement that MP "continues to break the bylaws" of the Del Mar Country Club is defamatory, at most it is an expression of opinion about an issue of law, not a statement of fact.

The amended petition also sets forth several causes of action in addition to libel that MP allegedly wants to investigate, including tortious interference with contract, civil conspiracy, and the like. However, a prospective libel plaintiff cannot avoid meeting the requirements for a libel claim by changing the label she places on her tort claims. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847, 853 n.1 (Tex. 2005); *Provencio v. Paradigm Media*, 44 S.W.3d 677, 683 & n.22 (Tex. App.- El Paso 2001), no pet. MP's additional causes of action thus do not provide her with any additional basis for discovery.

Moreover, even apart from the fact that some of the statements appear to be nonactionable opinion, there is no reason to believe that this Court would have personal jurisdiction over the anonymous speakers. To be subject to in personam jurisdiction, the Does must have "certain minimum contacts with [Texas] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Guardian Royal Exch. Assur. v. English China Clays,* 815 S.W.2d 223, 226 (Tex. 1991). The minimum contacts test requires "in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Guardian Royal*, 815 S.W.2d at 226; *see CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996). A defendant's connection with the state must be such that "he should reasonably anticipate being haled into court" in the state in the event of a dispute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts analysis generally requires assessment of whether the court is exercising "general" or "specific" jurisdiction. *Guardian Royal*, 815 S.W.2d at 227-28. The exercise of general jurisdiction requires that a defendant's contacts with the forum be "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Guardian Royal*, 815 S.W.2d at 226; *Siskind v. Villa Found. for Educ.,* 642 S.W.2d 434, 438 (Tex.1982). Even "continuous activity of some sorts within a state is not enough to support [general jurisdiction]." *International Shoe*, 326 U.S. at 318. Because the blog pertains to a country club near San Diego California, it is most likely that the Does live in or around San Diego. MP does not even allege in her petition that any of the Does own property in Texas or do business there. General jurisdiction

cannot, therefore, be the basis for the Court's assertion of jurisdiction to order discovery.

Specific jurisdiction is proper when the defendant's contacts with the forum are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8. To maintain specific personal jurisdiction, MP must show that: (1) each of the Does has purposely directed activities toward or purposely availed herself of the privilege of conducting business in Texas; (2) the cause of action arises from her activities in Texas; and (3) her conduct has a substantial enough connection with Texas to make the exercise of jurisdiction reasonable. The prospective defendants' contacts with the forum state must have been sufficiently purposeful that defendants should have had fair warning that they would be subject to suit there. *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990); *see Helicopteros*, 466 U.S. at 414; *Guardian Royal*, 815 S.W.2d at 227.

The complaint does not specify any basis for a finding of specific jurisdiction, but presumably petitioner will rely on her allegation that she resides in Dallas, and that the Internet can be viewed there. However, a specialized test has been applied to claims of personal jurisdiction based on a web site. The courts have adopted a sliding scale, first adopted in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), under which, on the one hand, a non-resident defendant's non-commercial web site (or a commercial but passive web site) is not a basis for jurisdiction just because it can be viewed in the forum state. On the other hand, a site that is highly interactive because it was designed to permit the owner to conduct business through the web site in the forum is likely to be a basis for personal jurisdiction in any forum in which commercial activity pertaining to the alleged wrongdoing has been conducted. Finally, when the web site displays some degree of commercial interactivity, the court's task is to examine the quantity and quality of the

commercial online interaction to determine whether it is sufficient to warrant subjecting the defendant to personal jurisdiction in the forum. Texas courts have endorsed this sliding scale analysis to decide whether specific jurisdiction was proper. *E.g.*, *W. Gessmann, GmbH v. Stephens*, 51 S.W.3d 329, 339 (Tex.App.–Tyler 2001), no pet.; *American Eyewear v. Peeper's Sunglasses & Accessories,* 106 F. Supp.2d 895, 901 n.10 (N.D.Tex 2000). *See also Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (court found a message board to be interactive but in the middle category where the extent of interactivity had to be evaluated).

Although the DMCCSucks blog was interactive in the sense that users could post messages, and although the site was commercial in that it carried advertising, the important point is that the web site was not **commercially interactive**. That is, Internet users could not transact business over the web site with the Does. Moreover, petitioner does not allege that the Does have transacted business with anybody in Texas, over the blog or otherwise. Thus, the sliding scale analysis bars the exercise of personal jurisdiction over the Does in this case.

Likewise, personal jurisdiction over the Does cannot be based on the fact that MP is allegedly a resident of Dallas, Texas. All of the sliding scale cases involved a plaintiff located in the forum state who could have claimed that the defendant's misconduct affected it in that state, yet the courts repeatedly rejected personal jurisdiction based on torts allegedly committed over the Internet. Moreover, it cannot be argued – and it certainly has not been alleged – that the Does' allegedly defamatory remarks were "aimed" at Texas. Neither the blog nor any of the anonymous comments mentioned Texas, and Texas was not the focus of the discussion on the blog. The discussion was about the operation of the Del Mar Country Club in California, and was presumably aimed at other members of the club in the vicinity of San Diego. *Revell v. Lidov*, 317 F.3d at 473-476 (no personal

jurisdiction because, although allegedly defamatory statements were about a former FBI agent from Texas, they were not about his Texas activities or directed to readers in Texas). *See also Abdel-Hafiz v. ABC, Inc.*, — S.W.3d —, 2007 WL 3408625 , at *5-*6 (Tex. App.– Fort Worth 2007), no pet.

(4) Require an Evidentiary Basis for the Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement prevents a plaintiff from being able to identify its critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless it comes forward with evidence in support of its claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id= 4969&rfi=8. One of the leading advocates of using discovery procedures to identify

anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the company that has filed the action. *Id.* In this very case, the prelitigation discovery petition has apparently had the effect of shutting down the blog.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v. Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D.Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such

examination will not suffice." *Id.* at 994.

The extent to which a proponent of compelled disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of its claims at the outset of its case, to obtain an injunction compelling the identification of the defendant, varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false or rests on confidential information. Thus, it is ordinarily proper to require a plaintiff to present proof of this element of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to proof of damages. Even if discovery is needed to develop the full measure of damages, a plaintiff should surely have some information at the outset supporting claims that it suffered actual damages.

In this case, MP has yet to introduce **any** evidence that any statements by the Does are false, or that any of the statements caused plaintiff to suffer **any** damage. Although two sentences in the amended petition are verified, the verification is signed by an associate in the law firm representing MP, who could not possibly have personal knowledge of whether any statements on the blog are true or false; nor, indeed, is the glancing reference in one of verified sentences to "the above-referenced false and libelous statements" sufficiently specific and concrete to create an evidentiary basis for a prima facie case of falsity. By contrast, the affidavit that the Court in *Alvis v Doe*, *supra*, deemed sufficient to justify identifying the Doe critic in that case provided a detailed factual rebuttal of each of several defamatory statements. (A copy of that affidavit is attached.) Moreover, neither of the verified sentences contains any reference to actual damages, although, at the very least, the assertions

that plaintiff violated the club bylaws, and that a **civil** suit against her is contemplated for breach of diuciary responsibility or even fraud, are claims of defamation per quod for which proof of damages is required to create a prima facie case. For this reason as well, the motion to quash should be granted.

(5) Balance the Equities.

After the Court has satisfied itself that a poster has made at least one statement that is actionable,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
>
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo.App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite, supra*, 775 A.2d at 760-761.

See also In re Hochheim Prairie Farm Mut. Ins. Ass'n, 115 S.W.3d 793, 795-796 (Tex. App.–

Beaumont 2003), no pet. (discovery under Rule 202 requires balancing of interests).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no basis to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). The requirement that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff's goal, to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction – and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427

U.S. 347, 373-374 (1976). In some cases, identification of the Does may expose them to a significant danger of extra-judicial retaliation. Because the anonymous petitioner has declined to identify herself, it is difficult to assess whether such reprisals are likely in this case. *But see America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) (refusing to allow anonymous plaintiff to pursue compulsory disclosure of identity of its critic).

However, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. The plaintiff retains the opportunity to renew its motion after submitting more evidence. And because the case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly on a limited basis from the anonymous defendant, as it attempts to develop sufficient evidence to warrant an order identifying the speaker.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of cause significant damage to the plaintiff, and the extent to which the plaintiff's own fault is responsible for the problems of which it complains.

D. The *Dendrite / Mobilisa* Standard Strikes the Right Balance of Interests.

The principal advantage of the *Dendrite*/*Mobilisa* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for

their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while at the same time ensuring that persons with legitimate reasons for speaking anonymously, while making measured criticisms, will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! stated at a hearing in California Superior Court that it had received "thousands" of such subpoenas. *Universal Foods Corp. v. John Doe*, Case No. CV786442 (Cal. Super. Santa Clara Cy.), Transcript of Proceedings July 6, 2001, at page 3.

Although no firm numbers can be cited, experience leads undersigned counsel to believe that the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. The decisions in *Dendrite*, *2TheMart.com*, *Melvin, Cahill* and other cases that have adopted strict legal and evidentiary standards for defendant identification have sent a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite*

standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged some would-be posters from the sort of Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that weights the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable.

CONCLUSION

The subpoena to Google should be quashed.

Respectfully submitted,

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November 29, 2007

CERTIFICATE OF CONFERENCE

I hereby certify that I contacted counsel for both petitioner and respondent to inform them that I planned to file this brief as amicus curiae, and the respondent's counsel consented, but petitioner's counsel refused to consent by a letter dated November 27, 2007, a copy of which is attached to this memorandum. David Broiles has contacted Donald Colleluori, counsel for Google, to request his consent, but had not yet reached him at the time of this certification.

Certified on November 29, 2007

_____
Paul Alan Levy

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused copies of this amicus curiae brief to be served on counsel for the parties as follows, by first-class mail, postage prepaid, as well as otherwise specified:

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