

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
LASALLE COUNTY, ILLINOIS

DONALD MAXON and JANET MAXON,)
)
 Petitioners,)
)
 vs.)
)
 OTTAWA PUBLISHING COMPANY, a)
 Delaware Limited Liability Company,)
)
 Respondent.)

No. 2008-MR-125

NOTICE OF FILING

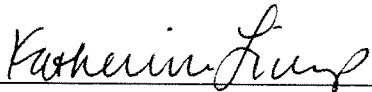
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Please take notice that on Friday, September 19, 2008, counsel for OTTAWA PUBLISHING COMPANY, LLC caused to be filed with the Clerk of the Circuit Court of LaSalle County, Illinois, its MOTION TO DISMISS AMENDED PETITION FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES PURSUANT TO ILLINOIS SUPREME COURT RULE 224, a copy of which is attached and hereby served upon you.

Date: September 19, 2008



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 OTTAWA PUBLISHING COMPANY, a)
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 Respondent.)
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 SUSAN WREN,)
)
 Defendant.)
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No. 2008-MR-125

**OTTAWA PUBLISHING COMPANY’S MOTION TO DISMISS AMENDED PETITION
FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES
PURSUANT TO SUPREME COURT RULE 224**

Ottawa Publishing Company, LLC¹ (“Ottawa Publishing Co.” or “Respondent”) respectfully moves to dismiss the Amended Supreme Court Rule 224 (“Rule 224”) Petition for Discovery Before Suit to Identify Responsible Persons and Entities filed by Petitioners Donald and Janet Maxon (“Maxons” or “Petitioners”). In support, Ottawa Publishing Co. incorporates the opposition brief and exhibits thereto that it filed on August 28, 2008 (attached hereto as Exhibit A), and further states as follows:

1. Count I of the Amended Petition asks this Court to order Ottawa Publishing Co. to divulge any identifying information it possesses that would allow Petitioners to identify “FabFive from Ottawa” and “Mary1955,” who posted allegedly defamatory comments on March

¹ Respondent was improperly named as Ottawa Publishing Company in the Amended Petition. The correct entity is Ottawa Publishing Company, LLC.

20, 2008 and April 17, 2008 relating to stories published on *www.mywebtimes.com*. The Petitioners apparently are no longer seeking identifying information relating to Birdie1, which was an object of the original petition, since they purportedly have identified her and have named her as a Defendant in Count II (albeit improperly, see *infra*). Birdie1 is separately represented by counsel, and therefore Ottawa Publishing Co., primarily focuses this motion on the allegations related to FabFive from Ottawa and Mary1955.²

I. Petitioners Have Not Met Their Burden Such That Anonymous Commenters' First Amendment Rights Should Be Violated

2. In its initial opposition brief (Exhibit A hereto), Ottawa Publishing Co. advocated for this Court to establish a summary judgment standard to determine if a media entity must disclose identifying information to a petitioner alleging defamation by anonymous postings on the Internet. See Exhibit A, pp. 9-10. Essentially this standard places the burden on Petitioners to demonstrate that the purported underlying defamation claim could successfully withstand a defendant's motion for summary judgment. Only if the court so found would it mandate a media respondent to disclose any identifying information it possesses about the anonymous

² As he did previously (see Exhibit A, p.9, n. 3), Ottawa Publishing Co.'s publisher John Newby sent an email and .pdf copy of the Amended Petition (without bulky exhibits) to the e-mail addresses registered to the screennames identified by Petitioners (FabFive from Ottawa and Mary1955) to inform them of the existence of the Amended Petition and the October 2 hearing date. Other than sending this Amended Petition to Mary1955, who was not identified in the original petition, and not to Birdie1, whose counsel was granted leave to intervene and fully participate in this proceeding, Mr. Newby's Declaration ("Newby Decl.") remains accurate and applicable to this motion.

Petitioners have not alleged that they have taken any steps to inform FabFive from Ottawa or Mary1955 of the existence of this Amended Petition.

commenter.³ This standard is the correct one because an individual has the constitutional right to speak anonymously. *Id.* at pp. 6-7. Ensuring that a petitioner can maintain a defamation case as a matter of law before ordering disclosure of identifying information of anonymous Internet commenters sufficiently balances one's right to speak anonymously against another's right not to be defamed.

3. The Amended Petition, however, still fails to demonstrate that Petitioners could survive a motion for summary judgment on their prospective defamation claim. Petitioners claim that the anonymous comments were made in a "context which by innuendo suggested Petitioners were guilty of making bribes to public officials." (Am. Petition, Count I, ¶ 9) Presumably Petitioners are attempting to allege that these statements impute that they have committed a crime and therefore constitute defamation *per se*, which exempts them from having to prove that they suffered actual damages. *See Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 517 (1st Dist. 1998). However, unlike in the original Petition, Petitioners do not specifically allege defamation *per se* in the Amended Petition. To the extent that they are not alleging defamation *per se*, they do not allege extraneous facts showing damages with the specificity required by this fact-pleading state to allow them to state a claim, much less sustain a summary judgment motion. *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 852-53 (5th Dist. 2006) (where defamatory character of a statement is not apparent on its face or it does not fall under a defamation *per se* category, damage to plaintiff's reputation is not presumed and the plaintiff must plead and prove extrinsic evidence showing that he suffered pecuniary damage).

³ As explained in Ottawa Publishing Co.'s prior filing, it would only be able to disclose the e-mail address used by the anonymous commenter, not the person's actual identity. See Exhibit A, p. 2, n. 2; Newby Decl., ¶ 4.

4. Nevertheless, even though a statement may fit into a defamation *per se* category, such a circumstance, standing alone, has no bearing on whether a statement is actionable because certain factors may render defamatory statements non-actionable as a matter of law. *Madison v. Frazier*, No. 07-1944, slip op. at 9, 2008 U.S. App. LEXIS 27978 at 10 (7th Cir. August 22, 2008) (applying Illinois law) (citing *Hopewell*, 299 Ill. App. 3d at 513). If a defendant's statements are capable of an innocent, non-defamatory construction, a plaintiff cannot maintain an action for defamation *per se*. *Id.* (internal citations omitted). The First Amendment also affords protection from liability to a speaker expressing an opinion that does not misstate actual facts. *Id.* It is evident from the allegations in the Amended Petition that either the First Amendment or innocent construction test would prevent Petitioners from withstanding a motion for summary judgment, and most likely, even a motion to dismiss.

The Anonymous Comments Are Protected Opinion

5. Petitioners could not overcome a summary judgment challenge to a defamation action based on the allegedly defamatory statements by FabFive from Ottawa and Mary1955 because they are protected opinion under the First Amendment. A defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact. *Hopewell*, 299 Ill. App. 3d at 518. Here, no reader could reasonably interpret that the litany of highly charged, emotional comments insinuating that Petitioners bribed the Ottawa Planning Commission ("OPC"), including those by FabFive from Ottawa and Mary1955, stated actual facts. To separate fact from opinion, courts consider three factors: 1) whether the statement is objectively verifiable as true or false, 2) whether the statement has a precise and readily understood meaning, and 3) whether the statement's literary or social context signals that it has factual content. *Id.* at 518-19.

6. While FabFive from Ottawa and Mary1955's comments perhaps could be objectively verifiable as true or false, the second and third factors heavily weigh in favor of protecting their anonymous speech. No precise core of meaning exists for the references to bribery because the First Amendment protects "overly loose, figurative, rhetorical or hyperbolic language, which negates the impression that the statement actually presents facts." *Id.* at 518. To a reasonable reader, the commenters' exaggerated tone and writing style severely weakens any credibility that might otherwise be given to their assertions of actual fact. The third factor further diminishes Petitioners' case because "some types of writing or speech by custom or convention signal to listeners that what is being read or heard is likely to be opinion, not fact." *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 867 (1st Dist. 1995). A reader would reasonably expect that anonymous comments posted on a newspaper's website in response to a story about a contentious political decision would contain opinions, not facts.

The Anonymous Comments Are Capable Of Innocent Construction

7. Additionally, the anonymous comments are not libelous because they may be innocently construed. Courts must interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader. *Bryson v. News Am. Pubs. Inc.*, 174 Ill.2d 77, 93 (1996). The innocent construction rule requires consideration of the statement in context, giving the words, and their implications, their natural and obvious meaning. *Salamone v. Hollinger Int'l*, 347 Ill. App. 3d 837, 840-41 (1st Dist. 2004) (holding that newspaper article stating that plaintiff referred to as a "reputed organized crime figure" could be innocently construed because when read in context, defendants characterized plaintiff as a person believed to be, possibly erroneously, an organized crime figure). *See also Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124, 134-136 (1st Dist. 2007) (when text of

entire article was considered, statements that plaintiff alleged tied him to organized crime were not defamatory because the article imputed criminal activity to others). *But see Tuite v. Corbitt*, 224 Ill.2d 490, 511-12 (2006) (statements implying plaintiff-attorney accepted bribes in exchange for securing clients' acquittals could not be innocently construed where focus of book was on crime and widespread corruption).

8. Here, when the voluminous comments are read as a whole, Mary1955's and FabFive from Ottawa's comments, as part of a larger debate about Ottawa's zoning laws, should be innocently construed. Mary1955's single remark early in the online discussion, "Money under the table?????????" does not impute criminal behavior toward anyone in particular, much less the Petitioners, nor is in response to a comment made about anyone in particular. For a statement to be actionable defamation *per se*, the statement must be interpreted as reasonably referring to the plaintiff. *Chapski v. Copley Press*, 92 Ill.2d 344, 352 (1982). Mary1955 refers to no one. FabFive's March 20, 2008 comment also, when read in context, reasonably indicates that FabFive is making a rhetorical point to emphasize his or her discontent with local government; in fact, like in *Seith*, FabFive's statements at the very most are imputing criminal activity to the OPC, not to Petitioners. The April 17, 2008 reference to the "BRIBED members" of the OPC also does not directly impute criminal activity by the Petitioners. Additionally, unlike in *Tuite*, these comments are not made in a context that implies they have any credibility – they were not part of an overarching discussion involving corruption by the Petitioners or the OPC. Moreover, the defamatory statements in *Tuite* – which imputed that plaintiff, a criminal defense attorney, bribed judges with his clients' retainer money – appeared in a memoir published by HarperCollins and written by a self-admitted mobster. *Tuite*, 224 Ill.2d at 495-95. As a result, the statements were more legitimate than the comments at issue here, which were

published in an informal, online medium. A reasonable reader would not be likely to take such rhetoric literally as an imputation of the commission of an actual crime. *See, e.g., Adams v. Sussman & Hertzberg, Ltd.*, 292 Ill. App. 3d 30, 47-48 (1st Dist. 1997) (statements attributed to defendant did not definitively impute commission of crime).

Recent Law Upholds Anonymous Internet Commenters' Rights

9. A very recent court decision from Montana also supports Ottawa Publishing Co.'s position that being ordered to produce identifying information about FabFive from Ottawa and Mary1955 could endanger First Amendment rights of anonymous speakers. A Montana state court judge ruled on September 3, 2008, that the state's Media Confidentiality Law (similar to the reporter's privilege law in Illinois) (discussed in Exhibit A, p. 5), protected anonymous commenters and quashed a subpoena to a newspaper seeking disclosure of information related to their identities. (*Billings Gazette* article describing case attached hereto as Exhibit B (Ottawa Publishing Co. was unable to find a published opinion)). The judge stated at the hearing, "I can't imagine an anonymous comment has much credence whatsoever." *See* Exhibit B. Nor do the subject anonymous comments published on *www.mywebtimes.com* have any credence.

II. Count II Is Procedurally Improper In This Presuit Discovery Proceeding

10. Ottawa Publishing Co. defers to counsel for Birdiel (who Petitioners purport to be Susan Wren) to address Count II, as this Count is not directed at Ottawa Publishing Co. However, it is important to note that "[a]scertaining identity is the only use for a Rule 224 action." *Gaynor v. Burlington N. & Santa Fe Railway*, 332 Ill. App. 3d 288, 294 (5th Dist. 2001). Where the identity of a potential defendant is known to the petitioner, Rule 224 may not be used to search for actual liability. *Id.* at 296-97. As such, Count II, which is an attempt to bring an

actual defamation claim against Susan Wren, is absolutely improper in this limited Rule 224 proceeding and must be dismissed.

11. Correspondingly, Susan Wren and/or Birdiel must be dismissed from this Rule 224 proceeding altogether as Petitioners claim to have ascertained her identity. To proceed further against her, they will need to bring a separate Law Division suit against her.

WHEREFORE, for these reasons and the reasons previously set forth in Ottawa Publishing Co.'s Brief in Opposition to Petitioners' original Supreme Court Rule 224 petition, Ottawa Publishing Company respectfully requests that this Court dismiss the Amended Rule 224 Petition with prejudice and for other relief that this Court deems appropriate.

Date: September 19, 2008

OTTAWA PUBLISHING COMPANY, LLC



One of Its Attorneys

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
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DONALD MAXON and JANET MAXON)

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Delaware Limited Liability Company,)

Respondent.)

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AUG 28 2008

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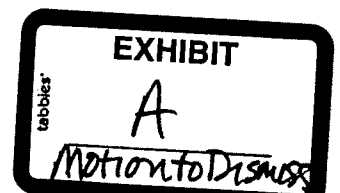
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THIRTEENTH JUDICIAL CIRCUIT OF ILLINOIS

**OTTAWA PUBLISHING COMPANY'S MEMORANDUM IN OPPOSITION
TO PETITION FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS
AND ENTITIES PURSUANT TO SUPREME COURT RULE 224**

Ottawa Publishing Company, LLC¹ ("Ottawa Publishing Co." or "Respondent") respectfully opposes the Supreme Court Rule 224 ("Rule 224") Petition for Discovery Before Suit to Identify Responsible Persons and Entities filed by Petitioners Donald and Janet Maxon ("Maxons" or "Petitioners"), which is set for hearing on August 29, 2008.

This proceeding raises important issues of First Amendment rights and free speech protections. Unlike the vast majority of Rule 224 petitions, which are routine proceedings in which a person with a potential cause of action seeks to discover the names of potential defendants from respondents (frequently hospitals, law enforcement agencies, or corporations), the Petitioners' request here may very well be the first instance in this State in which a petitioner has asked a circuit court to order a media respondent to divulge identifying information of individuals who have posted on an anonymous message board. As such, the

¹ Respondent was improperly named as Ottawa Publishing Company in the Petition. The correct entity is Ottawa Publishing Company, LLC.



Petition implicates important First Amendment rights requiring the Court to undertake careful Constitutional analysis and to evaluate the free speech implications of Petitioners' request.

Introduction

Petitioners are seeking to “ascertain the identities” or “other information as to, or leading to, the true identity of the person(s) who created, authored, communicated or otherwise asserted ... *Per Se* defamatory statements” as “birdie1” and “FabFive from Ottawa” on March 20, 2008, and April 15, 2008. (Petition, ¶¶ 1, 4, 5) Petitioners ask this Court to order Ottawa Publishing Co. to produce identifying information including “name, address, phone number, email address or other account information used to establish [birdie1 and FabFive from Ottawa’s] Blog ‘identity’, the password used for access to the Blog, or other identifying information.” (Petition, Prayer for Relief, ¶ 1(a))² Petitioners also seek a preservation order relating to the Internet postings.

Ottawa Publishing Co. is gravely concerned about the effect that granting Petitioners' disclosure request might have on its readers' freedom to write anonymously. While the nonspecific allegations contained in the Maxons' Petition may be, in certain cases, sufficient to establish the requirements of a traditional Rule 224 pre-suit discovery petition, they are not enough to force Ottawa Publishing Co. to divulge identifying information about people who posted messages on an Internet message board and presumably expected to remain nameless. Ottawa Publishing Co. is not aware of any case in which an Illinois court has ordered a media

² In order to post on the website, a person is not required to disclose his or her identity or other information, but need only supply an e-mail address. (See Declaration of John A. Newby (“Newby Decl.”), ¶¶ 3, 4, attached hereto as Exhibit 1) In this instance, Ottawa Publishing Co. is likely only to have the e-mail addresses provided by the posters, but this information would allow the Petitioners to pursue an action against the internet service provider to obtain the identification of the person with that registered e-mail address.

respondent to disclose identification of its Internet message board posters in response to a Rule 224 proceeding, but several courts facing this dilemma in other jurisdictions have held that the First Amendment mandates that, at a minimum, a petitioner must make a good faith showing that the information is necessary – and at a maximum must show that an ensuing defamation action could survive a motion for summary judgment – before a respondent is ordered to disclose identifying information of an anonymous speaker or writer. Here, Petitioners’ have not even alleged what the defamatory statements were, any elements establishing *per se* defamation, stated the basis for the assertion that such statements were *per se* defamatory, or stated any facts indicating how the Petitioners were injured by the alleged defamatory statements. Petitioners must do more if they believe their right not to be defamed outweighs an individual’s First Amendment right to post anonymously on the Internet.

Background

Ottawa Publishing Co. publishes a print edition of *The Times* six days a week and also, like many print newspapers, operates a World Wide Web-based version of its paper, which may be accessed at www.mywebtimes.com. (Ex. 1., Newby Decl., ¶ 1) One of the online features is the ability for individuals to comment on articles that are posted on the site. In order to post a comment, an individual must first register at the site by providing a pseudonym “screenname,” a password, and also a valid e-mail address. (*Id.*, ¶ 3) In order to begin posting, a user must activate his or her account by responding to a verification link sent to the email address that the user provides. (*Id.*) Ottawa Publishing Co’s privacy policy states that the newspaper “will not share your email address with any other company or organization for any purpose.” Ottawa Publishing Co. does not retain any additional identifying information for users

other than their screennames, associated passwords, and email addresses provided by users when establishing their accounts. (Ex. 1, Newby Decl., ¶ 4)

Argument

1. The Maxons' Perfunctory Rule 224 Petition Does Not Provide An Adequate Reason Why The Proposed Discovery Is Necessary

Supreme Court Rule 224 allows a person or entity to file an independent action by a person or entity who wishes to engage in discovery to ascertain the identity of one who may be responsible in damages. S.Ct. R. 224(a)(1)(i). The Petition must set forth: (A) the reason the proposed discovery is necessary, and (B) the nature of the discovery sought and for an order authorizing the petitioner to obtain such discovery. S.Ct. R. 224(a)(1)(ii). Ascertaining identity is the only use for a Rule 224 action. *Gaynor v. Burlington N. & Santa Fe Railway*, 322 Ill. App. 3d 288, 294 (5th Dist. 2001).

The Maxons' Petition, on its face, does not provide an adequate reason why the proposed discovery is necessary, and therefore does not satisfy the first prong of Rule 224. The Maxons apparently believe that something that was posted by two individuals in the spring of this year was defamatory, but gives neither the Court, Ottawa Publishing Co., nor the potential defendants any further information about the possible claim. This is particularly serious in a defamation action where the potential defendants' First Amendment rights are at stake.

Even if a conclusory statement that a tort occurred without any showing that a petitioner's claim may be successful normally satisfies Rule 224 standards, a more detailed petition should be required for a petitioner seeking disclosure of an anonymous Internet poster who allegedly has defamed a petitioner. Illinois courts have not yet prescribed a test for evaluating Rule 224 petitions that seek disclosure of authors of anonymous Internet postings, however. Ottawa Publishing Co. was able to locate one non-Internet case in which a petitioner

sought disclosure of identifying information of potential defendant in a defamation action via a Rule 224 petition, and there, the court held that the media respondent was shielded by the reporter's privilege. *Cukier v. Am. Medical Assoc.*, 259 Ill. App. 3d 159, 166 (1st Dist. 1994). In that case, Cukier and co-authors submitted a manuscript to the Journal of the American Medical Association (JAMA), and certified that they did not have any financial interest in the publication of the manuscript. *Id.* at 160. The editor of the publication subsequently sent petitioner a letter stating that it had come to their attention that petitioner might have at least an indirect interest in publication. *Id.* Petitioner insisted he did not, but JAMA declined to publish the manuscript. *Id.* at 161. Petitioner then filed a Rule 224 petition seeking disclosure of information of who made statements which called into question his professional honesty and integrity by alleging he had a financial interest in the publication of his paper, and named the American Medical Association, JAMA, and the editor as respondents. *Id.* Respondents opposed the petition and, *inter alia*, cited the reporter's privilege, 735 ILCS 5/8-901 *et. seq.*, in their opposition memorandum as justification for not having to release the information. *Id.* Ultimately, the trial court and appellate court agreed that the reporter's privilege applied and that without petitioner using the divestiture procedure established by statute and alleging why his need for disclosure outweighed the public interest in protecting the confidentiality of sources of information used by a reporter as part of the news gathering process, respondents should not be ordered to disclose the identity of any peer reviewers who may have stated that petitioner had a financial interest in publishing the article. *Id.* at 165.

Cukier, although not directly on point, is analogous to the situation here because the petitioner asked the court to order a publication to disclose the names of individuals that the publication believed would remain anonymous, and the publication objected. By applying the

reporter's privilege to cover a function – peer review – that is not clearly news gathering, the court emphasized the State's firm commitment to First Amendment rights. This Court should also recognize that a perfunctory Rule 224 petition is not legally sufficient when it seeks disclosure of the identity of an anonymous speaker or writer. Pre-suit discovery seeking the identity of a possible defamation defendant must, at a minimum, involve an understanding of what the defamatory statements were and then a balancing test to determine whether the rights of the allegedly defamed petitioner outweigh the anonymous potential defendant's First Amendment rights, similar to the analysis that the reporter shield statute requires a court to undergo when it is asked to force a reporter to disclose an anonymous source. *See* 735 ILCS 5/8-907(2). The reason is simple: Any lesser standard would have the impact of chilling a person's freedom of speech.

2. This Court Should Adopt A Summary Judgment Standard To Determine When Disclosure Of An Anonymous Internet Poster Is Required

Several courts in other jurisdictions have addressed the situation in which a potential plaintiff seeks disclosure of someone who has anonymously posted allegedly defamatory words about the potential plaintiff on the Internet, and the tests that they have devised may be instructive to this Court. Sometimes the situations involved pre-suit discovery, and other times the situations involved subpoenas in ongoing litigation. In all of the situations, courts have recognized the important evaluative exercise that they must undergo in order to balance a petitioner's rights to protect his or her reputation against the anonymous speaker's First Amendment rights.

Lower courts facing this issue recognize that the Supreme Court has held that the First Amendment of the United States Constitution protects a person's right to speak anonymously. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. App. 2007) (citing *Buckley v. Am.*

Constitutional Law Found., 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-51, 357 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960)). First Amendment protections fully extend to speech on the Internet. *Id.* (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). However, the First Amendment does not protect defamatory speech. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)). Therefore, when a court is faced with determining whose rights should prevail, it “must adopt a standard that appropriately balances one person’s right to speak anonymously against another person’s right to protect his reputation.” *Id.*

Courts in other jurisdictions have devised several tests to help them complete this unenviable task, and these are succinctly summarized in a recent case from the U.S. District Court for the District of Nevada called *Quixtar Inc. v. Signature Mgmt. TEAM, LLC*, 2008 U.S. Dist. LEXIS at 15-21 (D. Nev. July 7, 2008) (“Despite differences, the weight of authority holds that courts must adopt procedures that strike a balance between the plaintiff’s need to destroy the Doe’s anonymity and the anonymous speaker’s First Amendment rights.”) (case attached hereto as Exhibit 2).

The first approach compels disclosure of an anonymous speaker if such evidence is required for the case and the petitioner has a “legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed.” *Id.* at 17 (citing *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372 at 8 (2000)). However, as the *Quixtar* court indicates and as Ottawa Publishing Co. also believes, such an approach offers “no practical, reliable way to determine the plaintiff’s good faith and leav[es] the speaker with little protection.” *Id.* (citing *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1167 (6th Dist. 2008)).

The second approach requires the court to evaluate the plaintiff's need to identify the speaker, and requires that the plaintiff's allegations of illegality be able to withstand a motion to dismiss. *Quixtar*, 2008 U.S. Dist. LEXIS at 17-18 (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999)). However, this approach has also been criticized because it does not offer enough protection to anonymous speakers, particularly in notice-pleading jurisdictions. *Id.* at 18-19. While it might be more justifiable in a fact-pleading jurisdiction like Illinois, there may be times where the jurisdictional details of the alleged defamatory conduct become murky, such as where an anonymous speaker posts allegedly defamatory words on a website hosted in a notice-pleading jurisdiction but the potential plaintiff is located in Illinois. In such a case, this standard would cause confusion and increased litigation.

The third approach, which appears to be the most widely favored and which *Ottawa Publishing Co.* recommends that this Court adopt when considering the Plaintiff's Rule 224 petition, requires a plaintiff to submit evidence sufficient to overcome a limited motion for summary judgment attacking the actionability of the allegedly defamatory statements. *Id.* at 19 (citing *Cahill*, 884 A.2d at 460, which applied a modified test as set forth in *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001)). The frequently-cited *Dendrite* test, as summarized in *Cahill*, requires a plaintiff to:

1. Undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application;
2. Set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech;
3. Satisfy the *prima facie* or summary judgment standard; and

4. 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 in determining whether to allow the plaintiff to properly proceed.

Quixtar at 19-20 (citing *Cahill*, 884 A.2d at 460). *Cahill* then modified this test to collapse the second and fourth *Dendrite* requirements into the summary judgment analysis in the third element. *Id.* at 20-21.

Ottawa Publishing Co. believes that the summary judgment standard is the correct standard to apply when an Illinois court is faced with a Rule 224 petition to discover the identity of an anonymous Internet poster. While it may not always be most efficient for a petitioner to seek to inform anonymous speakers of a potential action as required in Step 1 of the *Dendrite/Cahill* test,³ there must be some proof of effort undertaken to inform the potential defendant(s) of the pending action so that they may have the opportunity to be represented at a hearing on the petition. The second step is also critical: The petitioner must inform the court and the respondent of the exact nature of the allegedly defamatory content so that both the court, the respondent, and the anonymous speaker know what words are at issue, and the court can make a determination as to whether the words are even actionable. In Illinois, whether allegedly defamatory words are protected by the First Amendment is a matter of law for the court to decide in the first instance. *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518 (1st Dist. 1998). If the words

³ Here, for example, Ottawa Publishing Co. was able to send messages to birdie1 and FabFive from Ottawa using the email addresses that they provided during the account registration process to inform them of the Rule 224 petition and the hearing date. (Ex. 1, Newby Decl., ¶ 5 and Ex. A thereto) This method was probably more effective than requiring the Maxons to try to contact birdie1 and FabFive from Ottawa by posting a comment on the site's message board, which may have no longer been active or accessible by the time the Maxons' petition was filed. As a result of Ottawa Publishing Co.'s message to the potential defendants, birdie1 apparently retained an attorney to represent his or her interests, who is now seeking leave to intervene in this action.

are not even actionable as a matter of law, there is absolutely no reason to disclose the identity of an anonymous speaker.

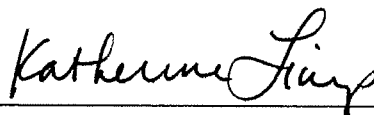
Finally, even if the words are actionable as a matter of law, the court must then evaluate whether the potential plaintiff meets other required elements to survive a motion for summary judgment on a libel claim before requiring disclosure of an anonymous speaker. To prove a defamation claim in Illinois, the evidence must show that a defendant made a false statement concerning the plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by the defendant, and that the plaintiff suffered damages as a result. *Madison v. Frazier*, No. 07-1944, slip op. at 8, 2008 U.S. App. LEXIS 27978 at 10 (7th Cir. August 22, 2008) (applying Illinois law). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. *Id.* at 7, 2008 U.S. App. LEXIS 27978 at 8-9 (holding that summary judgment in favor of defendant was warranted because the alleged defamatory words could be innocently construed, were non-actionable opinion, and were not made with actual malice). As the *Mobilisa* court stated in adopting the *Cahill* test, requiring the requesting party to demonstrate that it would survive a motion for summary judgment on all of the elements in that party's control (*i.e.* all elements not dependent on knowing the identity of the speaker), "furthers the goal of compelling identification of anonymous speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech." *Mobilisa*, 170 P.3d at 720.

Conclusion

Ottawa Publishing Co. therefore urges this Court to deny the Maxons' Rule 224 Petition on the grounds that it does not adequately set forth the reasons that Ottawa Publishing Co. should disclose any identifying information of an anonymous Internet poster. Should this Court wish to consider the Maxons' Petition, Ottawa Publishing Co. urges this Court to establish a standard more stringent than set forth in the text of Rule 224 to ensure that an anonymous speaker's First Amendment rights are given due consideration. This standard should require a petitioner or a respondent to attempt to contact the potential defendants to inform them of the proceeding, require a petitioner to set forth precisely the defamatory words at issue, and then require a petitioner to demonstrate that he or she could meet the *prima facie* elements of a defamation claim, i.e. show that the claim would survive a motion for summary judgment. Only after the Petitioners satisfy such elements should this Court then consider ordering Ottawa Publishing Co. to disclose identifying information of the potential defamation defendants.

Date: August 27, 2008

OTTAWA PUBLISHING COMPANY, LLC



One of Its Attorneys

Michael Conway (0506788)
Katherine Licup (6288355)
Foley & Lardner LLP (Firm # 17190)
321 North Clark Street, Suite 2800
Chicago, IL 60610
(312) 832-4500
(312) 832-4700

Exhibit 1

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
LASALLE COUNTY, ILLINOIS

DONALD MAXON and JANET MAXON,)
)
 Petitioners,)
)
 vs.)
)
 OTTAWA PUBLISHING COMPANY, a)
 Delaware Limited Liability Company,)
)
 Respondent.)
)
 STATE OF ILLINOIS)
) SS:
 COUNTY OF LASALLE)

No. 2008-MR-125

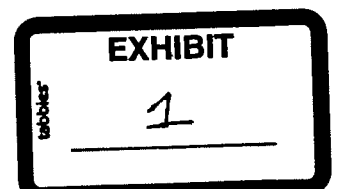
DECLARATION OF JOHN A. NEWBY

I, John A. Newby, declare under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that the statements set forth in this instrument are true and correct:

1. I am publisher of *The Times*, in Ottawa, Illinois. *The Times* is published six days a week by the Ottawa Publishing Company (“Ottawa Publishing Co.”) and also is published online at www.mywebtimes.com.

2. As publisher, I have personal knowledge of the allegations contained in Donald and Janet Maxon’s Petition for Discovery Before Suit To Identify Responsible Persons And Entities Pursuant to Illinois Supreme Court Rule 224, and am familiar with the procedure by which readers may post comments online at www.mywebtimes.com.

3. In order to post a comment on an online story at www.mywebtimes.com, an individual must first register at the site by providing a pseudonym “screenname,” a password,



and also a valid e-mail address. To comment, a user must then activate his or her account by responding to a verification link sent to the email address that the user provides.

4. Ottawa Publishing Co. does not retain any additional identifying information for users other than their screen names, associated passwords, and email addresses provided by users when establishing their accounts. Specifically, Ottawa Publishing Co. does not have access to the full name, address, or telephone number of the users who post comments at *www.mywebtimes.com*.

5. After receiving notice of the Maxons' Petition, I sent an e-mail and attached a .pdf copy of the Maxons' Petition to the e-mail addresses that "birdiel" and "FabFive from Ottawa" used to register their online accounts in an attempt to inform them of the pending action. The text of the email is reproduced as Exhibit A hereto.

I declare under penalty of perjury under the laws of the United States of America and the State of Illinois that the foregoing is true and correct.

Executed on this 26 th day of August, 2008

By: _____


John A. Newby

Exhibit A

Exhibit A

Formal Notification

Dear Sir or Madam:

A legal proceeding has been commenced in the LaSalle County Circuit Court seeking a court order requiring Ottawa Times Publishing, as proprietor of "mywebtimes.com" to disclose the e-mail addresses of persons anonymously posting on that website using the names "birdie1" and "FabFive from Ottawa." A court hearing on the motion seeking an order of disclosure is scheduled on August 29, 2008 at 10 a.m. in the Downtown LaSalle County Courthouse, 119 West Madison Street, Room 300, Ottawa, Illinois. The proceeding is Case No. 2008-MR-125. The petitioners in the proceeding are Donald Maxon and Janet Maxon ("Maxons"). Maxons claim that postings on the Internet Message Board on mywebtimes.com on March 20, 2008, April 15, 2008 and April 17, 2008 defamed them and the purpose of the legal proceeding is to obtain the identities of the persons who posted message using the names listed above.

Ottawa Times Publishing Company is providing you notice of this proceeding so that you may take whatever steps you deem advisable to consult legal counsel about your rights and to appear by counsel at the August 29 hearing to present your position to the Court.

Sincerely,

John A. Newby
Publisher - The Times

John A. Newby
Publisher - The Times
110 West Jefferson
Ottawa, IL. 61350
johnn@mywebtimes.com
1-815-431-4014 office
1-815-433-9473 fax

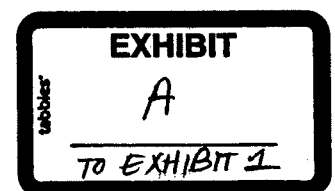


Exhibit 2

6 of 19 DOCUMENTS

QUIXTAR INC., Plaintiff, v. SIGNATURE MANAGEMENT TEAM, LLC d/b/a TEAM, Defendant.

3:07-CV-505-ECR-RAM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2008 U.S. Dist. LEXIS 56593

July 7, 2008, Decided

July 7, 2008, Filed

SUBSEQUENT HISTORY: Related proceeding at Simmons v. Quixtar, Inc., 2008 U.S. Dist. LEXIS 52535 (E.D. Tex., July 8, 2008)

PRIOR HISTORY: Simmons v. Quixtar, Inc., 2008 U.S. Dist. LEXIS 28595 (E.D. Tex., Apr. 8, 2008)

COUNSEL: [*1] For Quixtar Inc., Plaintiff: Bradley L Smith, James Cleland, LEAD ATTORNEYS, Brinks Hofer Gilson & Lione, Ann Arbor, MI; Brian Masternak, LEAD ATTORNEY, Grand Rapids, MI; Cedric C. Chao, LEAD ATTORNEY, San Francisco, CA; Dominic P. Zanfardino, LEAD ATTORNEY, Chicago, IL; Edward J. Bardelli, LEAD ATTORNEY, Warner Norcross & Judd, Grand Rapids, MI; James M. Schurz, William L. Stern, LEAD ATTORNEYS, Morrison & Foerster, San Francisco, CA; James R Sobieraj, LEAD ATTORNEY, Brinks Hofer Gilson & Lione, Chicago, IL; John J Frankovich, LEAD ATTORNEY, McDonald Carano Wilson LLP, Reno, NV; Miranda M Du, LEAD ATTORNEY, McDonald Carano & Wilson, Reno, NV.

For Signature Management Team, LLC d/b/a Team, Defendant: Daniel, J. LaCombe, Sharon M. Woods, LEAD ATTORNEYS, Barris, Sott, Denn & Driker, P.L.L.C., Detroit, MI; Joanne Geha Swanson, William A. Sankbeil, LEAD ATTORNEYS, Kerr, Russell and Weber, PLC, Detroit, MI; Morley Witus, LEAD ATTORNEY, Detroit, MI; Ricardo J Lara, LEAD ATTORNEY, Kerr, Russell & Weber, PLC, Detroit, MI; Wm. Charles Bundren, LEAD ATTORNEY, Wm. Charles Bundren & Associates, Frisco, TX; Adam K. Bult, Kirk B. Lenhard, Jones Vargas, Las Vegas, NV; Miranda M Du, McDonald Carano [*2] & Wilson, Reno, NV; Molly Malone Rezac, Wayne O. Klomp, Jones Vargas, Reno, NV.

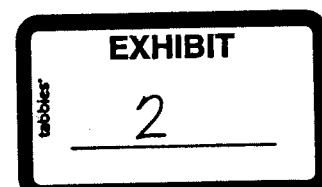
For Subpoena Respondents, Defendant: Michael Y. McCormick, LEAD ATTORNEY, McCormick Hancock & Newton, Houston, TX; Evan Beavers, Evan Beavers & Associates, P.C., Minden, NV.

For Benjamin L Dickie, III, Respondent: Daniel A. O'Brien, LEAD ATTORNEY, PRO HAC VICE, O'Brien Legal Services, Walled Lake, MI; Molly Malone Rezac, Wayne O. Klomp, Jones Vargas, Reno, NV; Adam K. Bult, Kirk B. Lenhard, Jones Vargas, Las Vegas, NV.

For Signature Management Team, LLC d/b/a Team, Counter Claimant: Morley Witus, LEAD ATTORNEY, Detroit, MI; Sharon M. Woods, LEAD ATTORNEY, Barris, Sott, Denn & Driker, P.L.L.C., Detroit, MI; Wm. Charles Bundren, LEAD ATTORNEY, Wm. Charles Bundren & Associates, Frisco, TX; Adam K. Bult, Kirk B. Lenhard, Jones Vargas, Las Vegas, NV; Molly Malone Rezac, Wayne O. Klomp, Jones Vargas, Reno, NV.

For Quixtar Inc., Counter Defendant: Bradley L Smith, LEAD ATTORNEY, Brinks Hofer Gilson & Lione, Ann Arbor, MI; Brian Masternak, LEAD ATTORNEY, Grand Rapids, MI; Cedric C. Chao, LEAD ATTORNEY, San Francisco, CA; Dominic P. Zanfardino, LEAD ATTORNEY, Chicago, IL; Edward J. Bardelli, LEAD ATTORNEY, Warner Norcross [*3] & Judd, Grand Rapids, MI; James M. Schurz, William L. Stern, LEAD ATTORNEYS, Morrison & Foerster, San Francisco, CA; James R Sobieraj, LEAD ATTORNEY, Brinks Hofer Gilson & Lione, Chicago, IL; John J Frankovich, LEAD ATTORNEY, McDonald Carano Wilson LLP, Reno, NV; Miranda M Du, LEAD ATTORNEY, McDonald Carano & Wilson, Reno, NV.

JUDGES: Edward C. Reed, UNITED STATES DISTRICT JUDGE.



OPINION BY: Edward C. Reed

OPINION

ORDER

Plaintiff Quixtar is a company that was formerly known as Amway. Defendant Signature Management TEAM ("TEAM") is a company that was started by former "Independent Business Operators" ("IBOs") with Quixtar. Plaintiff's Complaint (# 1), filed on October 23, 2007, states causes of action against Defendant for (1) violation of the Lanham Act, (2) trade secret misappropriation, (3) tortious interference with existing contracts, (4) tortious interference with advantageous business relations, and (5) a declaratory judgment regarding the viability of claims brought against Quixtar in Collin County Texas. Defendant's Counter-Claim (# 15), filed on November 14, 2007, states causes of action for (1) tortious interference with existing and advantageous business relations, (2) defamation, and (3) a declaratory [*4] judgment both that TEAM is not in violation of the Quixtar rules of conduct and that Quixtar's "IBO" contracts are unenforceable.

Currently pending before the Court is Defendant's Motion to Transfer the Case to the Eastern District of Texas, Sherman Division, Based on 28 U.S.C. § 1404(a)(# 22). Also pending is Benjamin Dickie's Objection to [the] Magistrate Judge's April 7, 2008 Order (# 124). Defendant TEAM has concurred (# 125) in that objection. For the reasons stated below, the motion (# 22) to transfer is **DENIED** and Dickie's objection (# 124) is **SUSTAINED** in part.

I. Defendant TEAM's Motion to Transfer

Defendant TEAM moves the Court to transfer this case to the Eastern District of Texas. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The burden of demonstrating that transfer is appropriate under section 1404(a) falls on the movant. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979).

The basic framework for deciding whether to transfer a case pursuant to section 1404(a) requires weighing (1) the [*5] convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F. Supp. 2d 1136, 1155-56 (D.Nev. 2002). A non-exclusive list of related considerations includes (1) the plaintiff's choice of forum; (2) the parties' contacts with the forum, and the extent to which the contacts are re-

lated to the pending action; (3) access to proof; (4) the cost of litigating in the two forums; (5) the availability of compulsory process, (6) judicial economy; (7) the court's familiarity with the governing law; and (8) the public policy of the forum state. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

Transfer under section 1404(a) "should not be freely granted." *In re Nine Mile Ltd.*, 692 F.2d 56, 61 (8th Cir. 1982), *overruled on other grounds by Mo. Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1311 (8th Cir. 1990). "The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal*, 805 F.2d at 843. Indeed, normally the plaintiff's choice of forum is [*6] given paramount consideration. *Galli v. Travelhost, Inc.*, 603 F. Supp. 1260, 1262 (D.Nev. 1985). Some courts have afforded less deference to a plaintiff's choice of forum where the plaintiff has not chosen its home forum. *See, e.g., Bryant v. ITT Corp.*, 48 F. Supp. 2d 829, 832 (N.D.Ill. 1999) ("where the plaintiff's chosen forum is not the plaintiff's home forum or lacks significant contact with the litigation, the plaintiff's chosen forum is entitled to less deference"). *Cf. Iragorri v. United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (adopting a sliding scale approach towards *forum non conveniens*).

Here, Defendant TEAM is organized under the laws of the State of Nevada and TEAM is also apparently owned by several Nevada corporations. TEAM's principal place of business is in Michigan. Plaintiff Quixtar is a Virginia corporation, headquartered in Michigan. Although Plaintiff has not brought this actions in its home forum, Plaintiff's decision to litigate this case in Nevada was not arbitrary. Further, it is readily apparent that this is not a dispute that is local in scope; no forum will be without its inconveniences. The Court finds that Plaintiff's choice of forum in this [*7] case is entitled to substantial, but certainly not dispositive weight.

Defendant's principal argument is that this case should be transferred due to ongoing litigation in state and federal courts in Texas, either on the grounds of judicial economy or for the convenience of the witnesses who may be called to testify in those cases. Defendant, however, has not made a substantial showing that judicial economy will be facilitated by transferring this action. With respect to litigation in federal court, one related federal action in Texas (*Simmons v. Quixtar*, 4:07-CV-389-MHS-DDB, 2008 U.S. Dist. LEXIS 52535) has been referred to arbitration and a second (*Simmons v. Quixtar*, 4:07-CV-487-MHS-DDB, 2008 U.S. Dist. LEXIS 28595) has been stayed on the basis of the *Colorado River* doctrine. Consolidation is thus unavailing. Neither has Defendant made any substantial showing that

the litigation in Texas state court renders transfer appropriate. Indeed, beyond the obvious fact that state and federal cases cannot be consolidated, one related case in Texas state court was dismissed on the basis of *forum non conveniens*. The assertion that discovery could be coordinated between state and federal cases is too speculative to be given significant weight. Finally, [*8] while Defendant contends that some of its important witnesses reside in Texas, Plaintiff has identified other witnesses it intends to call who reside in Nevada.¹ See *Graff v. Qwest Communs. Corp.*, 33 F. Supp. 2d 1117, 1121 (D.Minn. 1999) ("[T]ransfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer.") (citing *Van Dusen v. Barrack*, 376 U.S. 612, 646, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)), *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003) (same), *vacated on other grounds*, 542 U.S. 952, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004).

1 In general, the convenience that a transfer would have for counsel is not a relevant consideration under section 1404(a). See *Grubs v. Consol. Freightways, Inc.*, 189 F. Supp. 404, 410 (D.Mont. 1960). Even if it were relevant, it would not be given significant weight here. Defendant has retained competent counsel in Nevada and has not demonstrated any significant prejudice in defending this case in Nevada on this basis.

The Court gives significant weight to the fact that Plaintiff seeks a declaratory judgment related to TEAM's dismissed state law claims in Collin County Texas. Texas courts obviously have more expertise with issue of Texas law than Nevada courts, and [*9] this issue on its own makes the matter of whether to transfer this case quite close. By contrast, because no issue of corporate law is pleaded or otherwise apparent in this case, the Court does not give any weight at all to Plaintiff's contention that Defendant has abused Nevada corporate law.

All in all, the balance is close to equipoise. Accordingly, the motion (# 22) to transfer this case to the Eastern District of Texas, Sherman Division, is **DENIED**.

II. Dickie and TEAM's Objection

Benjamin Dickie and Defendant TEAM object (## 124, 125) to the Magistrate Judge's second Order (# 111) granting Plaintiff Quixtar's motion (# 54) to compel. The objection presents novel questions of law and will be sustained to the extent outlined below.²

2 The Magistrate Judge gave quite careful attention to these novel issues, but did not have the opportunity to address the issue of standing because it was not raised. The Court is obliged to

review the parties' legal contentions *de novo*, and does so in this Order.

A. Background

Plaintiff contends that TEAM has waged a wrongful, illegal internet campaign to induce Quixtar's "IBOs" to defect from Quixtar. In connection with Plaintiff's causes of action for [*10] tortious interference with business relations and tortious interference with an existing contract, Plaintiff took Benjamin Dickie's deposition on January 18, 2008. (Ex. P to P. Quixtar's Opp. (# 141).) According to Dickie, a part of his duties as a TEAM employee has been to work as a content manager for TEAM's web sites and blogs.³ Dickie testified that these sites include "www.the-team.biz," "www.chrisbrady.com," "orinwoodward.com," "www.launching-a-leadership-revolution.com," "orinwoodward.mindsay.com," "orinwoodward.tripod.com," and possibly others. When Plaintiff's counsel inquired whether there were other blogs that Dickie had set up, he responded in the affirmative and his counsel objected. Dickie's counsel then instructed Dickie not to answer questions regarding a pending lawsuit in Ottawa County (Michigan) on the basis of First Amendment privilege. The limited record indicates that this lawsuit was filed by Quixtar against unnamed Doe defendants. Dickie refused to answer any questions regarding whether he had any role in establishing or maintaining "freetheibo.com," "drinkxs.biz," "theiborebellion," "qreilly," "freetheibo blog," "quixtarlostmycents," "saveusdickdevos," "team-foundingfathers," [*11] "quixtartoday," "integrity-isteam," or "quixtatic." He also refused to answer whether he knew who posted videos on the internet under the titles "Hooded Angry Man," "Hooded Angry Man 2," "The New Amway Highlights," "Stevie goes to China," "Shameus McSteeley Quixtar versus Meijer," "Rich DeVos, Who's Running Your Company?," "Amway Yesterday," "Quixtar Tell Me Sweet Little Lies," and "Boston Teaberry Party."⁴ Dickie also refused to answer if there were other sites that he believed were covered by the privilege, and he refused to answer if he had ever posted under a pseudonym. Dickie's counsel explained that the privilege extended to his involvement or non-involvement with all of these web sites. At the time, the Michigan court had not addressed the issue of the discoverability of the identities of the Does, and there is no indication in the record that it has done so since. There is no information in this record regarding any subsequent rulings of the Michigan court.

3 "Blog" is short for "web log," which may be defined as follows: "A frequently updated web site consisting of personal observations, excerpts from other sources, etc., typically run by a single person, and usually with hyperlinks [*12] to

other sites; an online journal or diary." *Oxford English Dictionary*, <http://dictionary.oed.com> (last visited June 24, 2008).

4 As is true with any evidence, the Court will not independently research any of these web sites and will only consider evidence that is in the custody of the Clerk of the Court. A citation to a web site is insufficient to put the contents of that site into the Court's record.

Plaintiff filed a motion to compel (# 54) responses from Benjamin Dickie. The Magistrate Judge held a hearing on February 2, 2008, to address these and other pending motions. At the hearing, the Magistrate Judge stated that Plaintiff must be afforded the ability to ask about whether Dickie established various web sites to support its cause of action for tortious interference with a contract. (Hearing Tr., p. 46, Ex. B to P. Quixtar's Opp. (# 141).) Shortly thereafter, however, Quixtar's counsel posed the following question:

Mr. Chao: Let me ask you a question. We've already established, I think, through the questioning of the Court and Mr. O'Brien's answer, that if there's tortious conduct there's no First Amendment protection; so if there's a website out there, and let's say it's not affiliated [*13] with TEAM but he knows who it is, there's no First Amendment protection, and we should be allowed, should we not, to inquire into that?

The Magistrate Judge responded:

The Court: Well, no, not right now, because right now you have not shown me what's on every one of those websites that you believe is tortious. The answer to that is no.

(Hearing Tr., p. 46, Ex. B to P. Quixtar's Opp. (# 141).) Quixtar's counsel then distinguished between Dickie's role as a potential independent author and his role as an employee of TEAM, and further asserted that under the most demanding precedents, Quixtar had made the showing necessary to compel Dickie to answer. (*Id.* at 76.)

The Magistrate Judge focused primarily on whether Plaintiff's questions could be addressed to Dickie as an individual or merely in his capacity as an employee; the ultimate minute order granted Quixtar's motion, as follows:

IT IS ORDERED that the Motion to Compel Responses from Deponent Benjamin Dickie (Docket # 54) is GRANTED to the extent that Mr. Dickie shall respond to Quixtar's questions about his knowledge regarding the Internet sites, blogs, and videos that contain statements about Quixtar; both in his individual capacity and [*14] as an employee of TEAM.

(Order of February 21, 2008 (# 72).) Dickie then filed a motion for clarification (# 84), in which TEAM joined (# 85). The Magistrate Judge granted the motion for clarification, issuing the following revised ruling:

Mr. Dickie is to answer questions on the following:

1. Websites, blogs and videos which Mr. Dickie created or on which he posted content, as an individual or as a TEAM employee;
2. Websites, blogs and videos which other TEAM employees created or on which they posted content;
3. Websites, blogs and videos which TEAMS management and leaders (founders of TEAM, policy council members and other TEAM-identified "leadership") created or on which they posted content.

If following entry of this Order Quixtar learns of websites, blogs and videos containing potentially [tortious] content, the parties will submit letter briefs of no more than two (2) pages, exclusive of the excerpt of the potentially [tortious] content, for resolution by the court. If the court concludes that such additional content is potentially [tortious] then Mr. Dickie will be directed to answer questions regarding such websites, blogs and videos.

(Order of April 7, 2008 (# 111).) Dickie filed [*15] his objection (# 124) on April 24, 2008, which TEAM joined (# 125). Quixtar filed its opposition (# 141) to the objection on May 19, 2008.

B. Standard of Review

"A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3 where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary

to law." Local Rule IB 3-1; see 28 U.S.C. § 636(b)(1)(A). The "contrary to law" standard only applies to the Magistrate Judge's legal conclusions, which are reviewed *de novo*.

C. Relevant Authority in Analogous Circumstances

Dickie and Defendant TEAM argue that this Court should apply the standard articulated in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), and vacate the Magistrate Judge's order. Plaintiff Quixtar, on the other hand, argues that (1) the First Amendment is not implicated because tortious speech is not protected by the First Amendment; (2) the First Amendment affords no protections to anonymity in the context of "commercial speech"; (3) Quixtar has met any of the standards various courts have announced for [*16] requiring the disclosure of anonymous internet authors,⁵ which Plaintiff also asserts are inapplicable here because this case does not involve a subpoena to an internet service provider ("ISP"); and finally, (4) Dickie lacks standing to object to discovery based on the purported rights of anonymous third parties.

5 We consider authors writing under a pseudonym to be anonymous for the purposes of the issues raised in this Order.

Typically, analogous situations to the one presented here arise when a plaintiff seeks to compel an ISP to disclose the identity of a "Doe defendant" who wishes to remain anonymous. See generally *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 (6th Dist. 2008) (collecting and reviewing cases); Michele McCarthy, *Right of Corporation, Absent Specific Statutory Subpoena Power, to Disclosure of Identity of Anonymous or Pseudonymous Internet User*, 120 A.L.R. 5th 195 (2004) (same); Michael Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 Or. L. Rev. 795 (2004); Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L. J. 855 (2000). This is, apparently, the posture of the related case [*17] in Michigan. Several approaches have arisen in these circumstances. Despite differences, the weight of authority holds that courts must adopt procedures that strike a balance between the plaintiff's need to destroy the Doe's anonymity and the anonymous speaker's First Amendment rights. Moreover, no decision this Court has encountered has simply rejected procedural precautions on the basis that the anonymous speech was commercial in nature.

In the approach taken by the court in *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26,

2000 WL 1210372 (2000), *rev'd on other grounds by Am. Online v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va. 2001), disclosure will only be compelled if the evidence is required for the case and "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" 52 Va. Cir. 26, *Id.* at *8. This approach has been faulted for "offer[ing] no practical, reliable way to determine the plaintiff's good faith and leav[ing] the speaker with little protection." *Krinsky*, 159 Cal. App. 4th at 1167 (modification supplied).

A second approach requires the court [*18] to evaluate the plaintiff's need to identify the speaker, and requires that the plaintiff's allegations of illegality be able to withstand a motion to dismiss. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (requiring plaintiff to (1) "identify the missing party with sufficient specificity such that the Court can determine that the defendant is a real person or entity who could be sued in federal court"; (2) "identify all previous steps taken to locate the elusive defendant"; (3) "establish to the Court's satisfaction that the plaintiff's suit against the defendant could withstand a motion to dismiss"; and (4) "file a request for discovery with the Court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible"). The motion to dismiss approach has also been criticized by some courts for offering insufficient protections to anonymous speakers. See *Highfields Capital Mgmt., L.P., v. Doe*, 385 F. Supp. 2d 969, 975 & n.8 (N.D. Cal. 2005) [*19] ("It is not enough for a plaintiff simply to plead and pray. Allegation and speculation are insufficient. The standards that inform Rule 8 and Rule 12(b)(6) offer too little protection to the defendant's competing interests.").

A third, more demanding approach requires a plaintiff to submit evidence sufficient to overcome a limited motion for summary judgment attacking the actionability of the allegedly defamatory statements. See *Cahill*, 884 A.2d 451 (embracing and clarifying the standard applied in *Dendrite Int'l*, 342 N.J. Super. 134, 775 A.2d 756). The "prima facie" or "summary judgment" procedure is limited to evidence that is or should be in the possession of the plaintiff. Thus, whether or not the plaintiff is a public figure, he or she need not present evidence of "actual malice" as this would require evidence that the plaintiff does not have.⁶ *Cahill*, 884 A.2d at 464. The *Dendrite* standard, as summarized by *Cahill*, requires a plaintiff:

1) to undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition [*20] to the application. In the internet context, the plaintiff's efforts should include posting a message of notification of the discovery request to the anonymous defendant on the same message board as the original allegedly defamatory posting;

(2) to set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech;

(3) to satisfy the *prima facie* or "summary judgment standard"; [and]

(4) [to] 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 in determining whether to allow the plaintiff to properly proceed.

Cahill, 884 A.2d at 460 (modifications supplied); see also *Highfields*, 385 F. Supp. 2d at 974 n.6, 975 n.8 (relying on *Dendrite*); *Best Western Int'l., Inc. v. Doe*, CV-06-1537-PHX-DGC, 2007 U.S. Dist. LEXIS 61678, 2006 WL 2091695 (D.Ariz. 2006) (unreported) (following *Cahill*); *Krinsky*, 159 Cal. App. 4th at 1170-72 & 1172 n.14 (reviewing authority and adopting a "prima facie" test equivalent to that in *Cahill*). The *Cahill* court shortened the test, retaining the notice requirement but opining that the [*21] second requirement and the fourth requirement should both be considered implicit in the third requirement. 884 A.2d at 461. Thus, *Cahill* requires that the plaintiff give notice, or attempt to do so,⁷ and that the plaintiff satisfy a "prima facie or 'summary judgment standard'." 884 A.2d at 460-61.

6 Dickie and Quixtar ask the Court to adopt *Cahill*, but ignore this component of the *Cahill* opinion.

7 *Cahill* appears to insist that the plaintiff post a message on the web site at issue. This poses numerous problems, including the fact that the internet site may no longer exist. See *Krinsky*, 159 Cal. App. 4th at 1170 & n.11.

Finally, *Matrixx Initiatives, Inc. v. Doe*, 138 Cal. App. 4th 872, 42 Cal. Rptr. 3d 79 (6th Dist. 2006), allowed discovery to proceed without inquiring into the protections required by the First Amendment on the basis that the party who opposed discovery was not, or at least did not admit to being, the anonymous author. There, the plaintiff traced postings made under two pseudonyms on an internet financial bulletin board to a hedge fund, and the hedge fund's manager refused to answer any questions regarding the identities of the anonymous authors at his deposition on the grounds that their anonymity [*22] was protected by the First Amendment. *Id.* at 876. The California Court of Appeal held that under these circumstances the non-party lacked standing to raise the issue of the anonymous speaker's First Amendment rights. *Id.* at 879-81. Although the California Court of Appeal is not an Article III court, the Court relied on Article III jurisprudence, *id.* at 878 n.4, and found that the party seeking to quash discovery did not have the "close relationship" with the anonymous author required to raise the third party's rights.⁸ *Id.* at 880-81 (citing *NAACP v. Ala.*, 357 U.S. 449, 458-460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)).

8 The *Matrixx* court's factual reasoning is not entirely clear. The court noted that the postings could be traced to a hedge fund, but nevertheless considered the anonymous authors to be "presumably unrelated third parties." 138 Cal. App. 4th at 881.

D. Analysis of Dickie and TEAM's Objection

While a pseudonym can certainly be expressive, more important than the expression of the pseudonym, at least in general, is the condition of expression that anonymity affords.⁹ Anonymity can focus the audience on the speech rather than the speaker, and more pragmatically, it is a useful antidote to reprisal and the [*23] other potential inconveniences and adversities of publicity. "Anonymity," the Supreme Court has noted, "is a shield from the tyranny of the majority," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), and "[t]he 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." *Id.* at 341-42.¹⁰ Where speakers may remain anonymous, ideas are communicated that would not otherwise come forward. See *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D.Wash 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."). To fail to protect anonymity is, therefore, to chill speech. Yet where speakers remain anonymous

there is also a great potential for irresponsible, malicious, and harmful communication, and the lack of accountability that anonymity affords is anything but an unqualified good. This is particularly true where the speed and power of internet technology makes it difficult for the truth to "catch up" to the lie. See Lidsky, *Silencing* [*24] *John Doe*, 49 Duke L. J. at 864. Anonymity thus presents benefits, risks, and problems. To the extent that Courts take on the task of protecting it, balancing is inevitable.

9 The distinction is significant: As a condition of speech, rather than pure speech, anonymity is unique in that it can be subsequently destroyed through negligence, or for that matter, an intentional act of the speaker.

10 On numerous occasions the Supreme Court has held that anonymity must be afforded some amount of First Amendment protection, albeit in cases primarily involving prior restraints. See *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (invalidating a statute that required circulators of an initiative petition to wear identification badges); *McIntyre*, 514 U.S. at 357 (overturning law that prohibited distribution of campaign literature that did not contain the name and address of the distributor); *Talley v. California*, 362 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (invalidating law prohibiting the distribution of "any handbill in any place under any circumstances" that did not contain the name and address of the person who prepared it, on the grounds that the law would chill "perfectly peaceful discussions [*25] of public matters of importance"); *NAACP v. Ala.*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (holding that discovery order requiring NAACP to disclose its membership interfered with freedom of association). *But cf. Branzburg v. Hayes*, 408 U.S. 665, 695-708, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (White, J., writing for a plurality) (concluding that a reporter does not have a First Amendment right not to reveal unnamed sources to a grand jury).

With this in mind, caution is warranted with respect to purported *per se* rules. In particular, a *per se* assertion that the First Amendment does not protect tortious speech is not terribly helpful for the purposes of legal analysis.¹¹ First, the scope of First Amendment protections of speech is not, and should not be defined by state law torts.¹² Second, states, including the State of Nevada, have long recognized the importance of the First Amendment in crafting and delimiting the scope of actionable defamation. Third, the tort of interference with a contract need not, at least in theory, be founded in speech

at all, but this cannot mean that the First Amendment is not implicated by the cause of action where speech is alleged to be harmful. See *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177, 1183 (Cal. 1986) [*26] ("The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values."). Fourth, and relatedly, there is every reason to predict that the Nevada Supreme Court would apply state law privileges designed to protect speech in the context of tortious interference with a contract, just as it has with defamation. *Cf. Blatty*, 728 P.2d at 1183.¹³ Thus, in sum, the Court must look beyond a simple recitation of the elements of the torts at issue in this case to determine whether the statements are actionable.

11 Compare *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 254-255, 72 S. Ct. 725, 96 L. Ed. 919 (1952) (libelous utterances are unprotected speech); *Chaplinsky v. State of N.H.*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (same), with *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (holding that prohibitions against libel "can claim no talismanic immunity from constitutional limitations").

12 *New York Times Co.*, 376 U.S. at 269.

13 Notably, [*27] there is no First Amendment "opinion privilege," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), but the Nevada Supreme Court recognizes such a privilege. See *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82, 87 (Nev. 2002) ("Statements of opinion cannot be defamatory because 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)).

Of course, the inquiry is also complicated by the fact that it is impossible on this record to establish whether Dickie or TEAM have standing to raise their objection. See *Matrixx*, 138 Cal. App. 4th 872, 42 Cal. Rptr. 3d 79. The well established rule, subject to pragmatic and important exceptions,¹⁴ is that, "[i]n the ordinary case, a party is denied standing to assert the rights of third persons." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); see, e.g., *Secretary of State of Md. v. Joseph H.*

Munson Co., 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984); *Warth*, 422 U.S. at 501. "Jus tertii" standing generally requires (1) that the litigant has suffered an injury in fact, [*28] (2) that the litigant has a "close relationship" to the third party, and (3) that there is some hindrance to the third party's ability to protect his or her own interests. *Powers*, 499 U.S. at 411. It should be noted that the inquiry into whether there is a "close relationship" is functional in nature, and it is not necessarily required that the parties know, work, or associate with one another. *See id.* at 413 (juror and criminal defendant have required relationship where "the relationship between [them is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter") (modification supplied; quoting *Singleton v. Wulff*, 428 U.S. 106, 115, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)). Even with this observation, however, it is impossible to determine on this record if either of the first two requirements for third party standing are met.

14 *E.g. Powers v. Ohio*, 499 U.S. 400, 415, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (defendant in a criminal case has standing to raise the third-party equal protection claims of jurors excluded by the prosecution because of their race); *Craig v. Boren*, 429 U.S. 190, 192-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (permitting beer vendors to assert rights of prospective male customers who were barred, unlike females of [*29] the same ages, from purchasing beer). Notably, third party standing is a jurisprudential, not a constitutional or jurisdictional problem. *Craig*, 429 U.S. at 193-94; *see also Warth v. Seldin*, 422 U.S. 490, 500-01, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties.").

Among the many reasons for requiring parties to rely on their own rights in Article III courts is the need to avoid simple obstruction based on speculation regarding the positions of persons not before the court. Dickie has no standing to object to answering questions about what he does not know with respect to internet sites with which he has no involvement. Dickie may or may not have standing to otherwise object, depending upon the facts which he refuses to divulge. Moreover, to the extent that he does have standing, he clearly cannot refuse to answer if he had any involvement with the mere administration of a website without articulating why this administration implicates his First Amendment rights.

Plaintiff is correct that the authors of the internet [*30] postings at issue could have contested the discov-

ery of their identities using pseudonyms in this Court. *See Doe v. Bolton*, 410 U.S. 179, 187, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (use of a pseudonym in litigation is permissible and does not destroy standing). Again, this is the typical posture of similar cases. Nevertheless, the fact that the third parties may not have been put on notice that their identities may be divulged via discovery is certainly a potential "hindrance to the third party[ies]' ability to protect [their] interests." *Powers*, 499 U.S. at 411 (modification supplied).

In this Court's view, the fact that there has been an insufficient showing of standing, third party or otherwise, should not simply end the inquiry. First, it is possible that such a showing could be made in this case without creating a situation where there is "nullification of the right at the very moment of its assertion." *NAACP*, 357 U.S. at 459. Second, the fact that permitting discovery amounts to prospective court action is not insignificant here, and the Court is not without independent authority to adopt procedures to protect against potential violations of third party constitutional rights. To fail to inquire into the merits [*31] of this issue, *e.g., Matrixx*, 138 Cal. App. 4th 872, 42 Cal. Rptr. 3d 79, may well be to decide them in practice, and this is problematic where there is at least good reason to believe that the anonymous authors of the internet postings would object to their identities being revealed without notice.

The order of the Magistrate Judge will be vacated in order to allow Dickie and TEAM a reasonable opportunity to notify third party authors that Dickie may be obliged to reveal their identities. Any party, including Dickie, who wishes to oppose the divulgence of his or her identity may do so under a pseudonym,¹⁵ and the Court should refrain from acting for a reasonable amount of time to allow for this possibility. That said, the Court will not consider any further objections based on anonymity unless there is a factual basis for finding that the objecting party has standing to raise the objection.

15 The Court notes that this likely would have been the procedure if the facilitator of the third party internet communication had been a cable ISP. *See* 47 U.S.C. § 551(c)(2)(B); *Cahill*, 884 A.2d at 455 & n.4. *E.g. Warner Bros. Record Inc. v. Does 1-14*, No. 07-CV-706 (RJL), F. Supp. 2d , 2008 WL 60297 (D.D.C. Jan. 4, 2008) [*32] (allowing subpoena of ISP, but also allowing subscriber time to file motion to quash). The Court sees no reason why this is not analogous and persuasive authority regarding the principles that should apply here.

For the guidance of the Magistrate Judge, the Court finds that so long as an objection is raised by a party with standing to raise it, *Cahill* articulates the correct stan-

dard. See *Highfields*, 385 F. Supp. 2d at 975. Cf. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-69, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) ("federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"). It appears that the Magistrate Judge tailored the discovery he allowed to the elements of the torts at issue. On the one hand, no tailoring beyond the general restraints of relevance is necessary unless a party with standing makes a proper objection. On the other hand, more particularized tailoring may be necessary if a proper objection is raised. In particular, to the extent that a party with standing raises a meritorious objection, Plaintiff should not be afforded discovery regarding the identity of any anonymous [*33] author where the exact statement at issue has not been put into evidence.¹⁶ Nor is discovery warranted into the identity of an anonymous author where it is beyond reasonable dispute that the particular internet postings at issue are subject to a privilege or defense.

16 For example, at present, neither the videos nor any detailed description of their contents is in the Court's record.

III. Conclusion

IT IS, THEREFORE, HEREBY ORDERED THAT the motion (# 22) to transfer this case to the Eastern District of Texas is **DENIED**.

IT IS FURTHER ORDERED THAT Dickie's objection (# 124) is **SUSTAINED** to the extent stated in this Order. The Order of April 7, 2008 (# 111) is **VACATED** and the matter is **REMANDED** to the Magistrate Judge for further proceedings. Dickie's motion (# 159) to file a reply brief is **DENIED** as moot.

The Magistrate Judge should withhold action for a reasonable period of time (1) to allow Dickie and TEAM to notify interested parties that, if they wish to do so, they may contest the discovery of their identities under pseudonyms, and (2) to allow any such party to file an opposition. Any party that raises an objection must demonstrate that he or she has standing to raise the objection. [*34] At present, no such showing has been made. The nature of any further proceedings that may be required is left to the Magistrate Judge's wise discretion.

DATED: This 7th day of July, 2008.

/s/ Edward C. Reed

UNITED STATES DISTRICT JUDGE

Edward C. Reed



Story available at <http://billingsgazette.net/articles/2008/09/04/news/local/35-privacy.txt>

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Judge: Anonymity protected

**By GREG TUTTLE
Of The Gazette Staff**

A District Court judge found Wednesday that the state shield law that protects reporters from disclosing anonymous sources also protects the identity of anonymous commentators on a newspaper's Web site.

Judge G. Todd Baugh granted a motion filed by The Billings Gazette to quash a subpoena that sought information that may lead to the identity of those who post comments on the newspaper's online edition.

Russ Doty, a 2004 candidate for the Public Service Commission, issued the subpoena as part of his civil lawsuit against Brad Molnar. The lawsuit accuses Molnar, who won the PCS election against Doty, of libel and slander during the campaign.

At the end of a hearing into the Gazette's motion on Wednesday, Baugh said the state's Media Confidentiality Act protects the newspaper from being forced to provide the information sought by Doty.

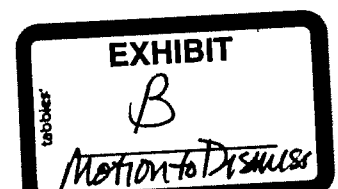
Baugh also noted that the information Doty was seeking from The Gazette was related to comments made long after the 2004 campaign. The judge asked Doty whether the anonymous comments have enough credibility to reach the legal requirements of libel and defamation.

"I can't imagine an anonymous comment has much credence whatsoever," Baugh said.

Doty said he sought the information from the newspaper to bolster his claim that his reputation in the community had been harmed by the alleged libel he attributes to Molnar. Several newspaper commentators would be valuable witnesses in his case, Doty told the judge.

Doty also sought the identity of newspaper commentators whom he suspected as being Molnar himself. The subpoena, served on the newspaper in July, sought "all electronic information ... you have including but not limited to IP addresses, e-mail addresses, and other identity and contact information" for Molnar.

In a deposition taken previously in the case, Molnar denied that he used the monikers "CutiePie" and "Always, wondering" to post comments on the newspaper's Web site. Doty said knowing the identity or contact information of those two commentators would help him prove his libel case against Molnar.



"I have a right to test whether or not Molnar is telling the truth when he says in his deposition that he is not either of these people," Doty said.

Gazette attorney Martha Sheehy argued that the information sought by Doty is privileged under the state's Media Confidentiality Act, commonly known as a shield law.

The act protects from forced disclosure "any information obtained or prepared" by a news agency. Sheehy said the information sought by Doty in the subpoena clearly falls within the protection of the act.

"Whether posted on a message board or printed in the newspaper makes no difference," Sheehy said.

In an affidavit, Gazette Editor Steve Prosinski said the newspaper does not require or know the real names of persons who post comments on stories. Commentators are required to register before posting comments, but they are only required to provide an e-mail address when they create a "nickname."

The commentator's IP address, which is an Internet tracking number, is also collected as part of the registration process, Prosinski said. But the newspaper does not control the IP address or have access to the name of the person associated with each number.

Prosinski said the online story comments are a "core service and integral part" of the newspaper's business, and allowing anonymous comments serves the public "by fostering democratic discourse through communities of users."

Doty argued such information is not protected because it was not gathered as "news."

"The scope of the statute is to shield the news media from disclosing 'news' sources or any information obtained or prepared when 'gathering, writing, editing or disseminating news,' " Doty wrote in a court brief. "Blogs and online comment simply are not 'news.' Therefore, the persons who comment are not protected by a statutory privilege."

Molnar did not attend the hearing, but his attorney, Jack Sands, told Baugh that the information sought by Doty was not relevant to the lawsuit.

"All this discussion is really irrelevant to the case before the court," Sands said.

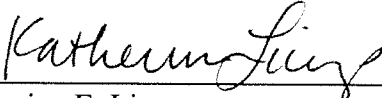
Doty filed the lawsuit against Molnar in 2006 in District Court in Helena. The case was later moved to Yellowstone County where Molnar resides. A trial date has not been set.

CERTIFICATE OF SERVICE

I, Katherine E. Licup, an attorney, certify that on September 19, 2008, I caused a copy of Respondent's MOTION TO DISMISS AMENDED PETITION FOR DISCOVERY BEFORE SUIT TO IDENTIFY RESPONSIBLE PERSONS AND ENTITIES PURSUANT TO ILLINOIS SUPREME COURT RULE 224 to be served on the following attorneys by U.S. mail, first-class postage prepaid:

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